TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 114.

COMMERCIAL MUTUAL ACCIDENT COMPANY, PLAINTIFF IN ERROR,

vs.

MARY B. DAVIS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JUNE 21, 1906.

(20,771.)

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a *Citation.*

UNITED STATES OF AMERICA, *sct:*

To Mary B. Davis, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Western Division of the Western District of Missouri, wherein the Commercial Mutual Accident Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Smith McPherson Judge of the Circuit Court of the United States for the Western Division of the Western District of Missouri, this 7th day of June in the year of our Lord one thousand nine hundred and seven.

SMITH McPHERSON, *Judge.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, sct:

I hereby acknowledge due service of the within Citation this 7 day of June, A. D. 1907.

W. C. SCARRITT,
Attorney for Defendant in Error.

b [Endorsed:] 3170. Mary B. Davis, Pl'f, *v.* Commercial Mutual Accident Company, Def. Citation. Filed June 7, 1907. Adelaide Utter, Clerk.

c UNITED STATES OF AMERICA, *sct:*

The President of the United States to the Judges of the Circuit Court of the United States for the Western Division of the Western District of Missouri, Greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, between Mary B. Davis, Plaintiff, and Commercial Mutual Accident Company, Defendant, a manifest error hath happened, to the great damage of the said defendant as by its complaint appears.

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so

that you may have the same at Washington, D. C., not exceeding thirty days from the date of these presents in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court.

Issued at office in Kansas City, this 7th day of June A. D. 1907.

[Seal of the United States Circuit Court for the Western District of Missouri, Western Division.]

ADELAIDE UTTER, *Clerk,*
By —— ——, *D. C.*

Allowed by
SMITH McPHERSON, *Judge.*

d [Endorsed:] 3170. United States Circuit Court, Western District of Missouri, Western Division. Mary B. Davis *vs.* Commercial Mutual Accident Co. Writ of Error. Filed June 7, 1907. Adelaide Utter, Clerk.

WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *sct:*

I do hereby return due and perfect obedience to the within writ, and do herewith, under the seal of said U. S. Circuit Court, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same.

Witness my hand as Clerk, and the seal of said Court.

Issued at office in Kansas City this 20th day of June A. D. 1907.

[Seal of the United States Circuit Court for the Western District of Missouri, Western Division.]

ADELAIDE UTTER, *Clerk,*
By —— ——, *Deputy Clerk.*

1 UNITED STATES OF AMERICA, *sct:*

Be it remembered, that heretofore, to wit, on the 25th day of March, A. D. 1907, the following entry was made of record in the Circuit Court of the United States for the Western Division of the Western District of Missouri, in the case wherein Mary B. Davis is plaintiff and the Commercial Mutual Accident Company is defendant:

3170.

MARY B. DAVIS
vs.
COMMERCIAL MUTUAL ACCIDENT COMPANY.

This day there is filed herein a stipulation for transferring this case from the Central Division to this Division a transcript of the record entries and an abstract of costs, and the transcript from the Howard County Circuit Court and a motion to quash the return of the Sheriff.

Said Stipulation is in words and figures as follows:—

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

MARY B. DAVIS, Plaintiff,
vs.
THE COMMERCIAL MUTUAL ACCIDENT COMPANY, a Corporation, Defendant.

Stipulation.

It is hereby stipulated by and between the parties plaintiff and defendant thereto that the above entitled action be transferred and the venue thereof changed to the Western Division of the Western District of Missouri, and that the original record and papers therein may be sent by the Clerk of said Court to the United States Circuit Court at Kansas City in lieu of a transcript of such record and papers.

This stipulation shall not be deemed an entry of appearance by defendant nor any waiver by defendant of any right to object to the jurisdiction of the court or to the service of process herein.

2 SCARRITT, SCARRITT & JONES,
Attorneys for Plaintiff.
ROSENBERGER & REED,
Attorneys for Defendant.

March 16, 1907.

On the back of said Stipulation appears the following:—
No. 3170. Mary B. Davis *vs.* The Commercial Mutual Accident Company. Stipulation. Filed Mar. 19 1907. H. C. Geisberg, Clerk. Scarritt, Scarritt & Jones, Attorneys at Law, American Bank Bldg., Kansas City, Mo. Filed March 25, 1907. Adelaide Utter, Clerk.

Said transcript of record entries is in words and figures as follows:

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

In Vacation, March 9, 1907.

On this day the following, among other proceedings, were had, to-wit:

2½ 2319.

MARY B. DAVIS
vs.
THE COMMERCIAL MUTUAL ACCIDENT COMPANY.

This day there is filed a transcript of the record of the proceedings in this cause as certified from the Circuit Court of Howard County, Mo., and thereupon comes the defendant by its attorneys and files a motion to quash the return of the sheriff on the writ of summons issued herein.

Be it remembered that at a regular stated term of the Circuit Court of the United States for the Central Division of the Western District of Missouri, begun and held on the Third Monday, the 18th day of March, A. D. 1907, the following proceedings were had in the above entitled cause on the 19th day of March, A. D. 1907.

Present: The Hon. John F. Philips, Judge.

2319.

MARY B. DAVIS
vs.
THE COMMERCIAL MUTUAL ACCIDENT COMPANY.

This day there is filed a stipulation of counsel for the transfer of this cause; on consideration whereof, it is ordered that
3 this cause be transferred to the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City, Mo., and that the Clerk of this Court forward to the Clerk of said Court the files in this cause and a certified transcript of the orders and record entries herein.

I, Henry C. Geisberg, Clerk of the Circuit Court of the United States for the Central Division of the Western District of Missouri, do hereby certify that the foregoing is a true transcript of record entries in the above entitled cause, as fully as the same remain in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Office in the City of Jefferson, in said District, this 23rd day of March, A. D. 1907.

[SEAL.] H. C. GEISBERG, *Clerk.*

Said transcript from the Howard County Circuit Court is in words and figures as follows:—

In the Circuit Court of Howard County, Missouri.

Be it remembered that on the 27th day of February, 1907, there was filed with the Clerk in vacation, a petition, which said petition is in words and figures as follows, to-wit:

In the Circuit Court of Howard County, Missouri, at Fayette, April Term, 1907.

No. —.

MARY B. DAVIS, Plaintiff,
vs.
THE COMMERCIAL MUTUAL ACCIDENT COMPANY, a Corporation, Defendant.

Petition.

Plaintiff for her cause of action against defendant states that she is the widow and during his life and at the time of his death was the wife of Arthur F. Davis, deceased, hereinafter mentioned; and that defendant is a corporation organized and existing according to law and is engaged in transacting the business of accident insurance.

4 That on or about the 6th day of August, 1896, one Arthur F. Davis, who was then and until his death remained a citizen and resident of the State of Missouri and domiciled therein, became a member of defendant company and on the same date defendant company issued and delivered to said Arthur F. Davis, within the State of Missouri, a certain membership certificate or insurance policy whereby defendant, for valuable consideration, agreed that the said Arthur F. Davis was, while in good standing, a member of defendant company and entitled to all the benefits under the provisions of said certificate or contract of insurance and named in the constitution and by-laws of defendant; that it is provided in said certificate or contract of insurance that, should said Arthur F. Davis receive a bodily injury caused solely by external, violent and accidental means, and that if such injury should result in the death of the said insured within ninety days thereafter, defendant company would pay the sum of five thousand ($5000.00) dollars to the said Mary B. Davis, plaintiff herein. Which said certificate or contract of insurance is herewith filed and made a part of this petition as if fully set out herein.

Plaintiff further states that on the 31st day of December, 1906, the said Arthur F. Davis, while a member of defendant company in good standing, and while in the City of Fayette, Missouri, received a bodily injury caused solely by external, violent and accidental means, to wit an accidental gun shot wound which injury resulted

in the death of said Arthur F. Davis on the 4th day of January, 1907, at the said city of Fayette, Missouri.

Plaintiff further states that in due time after the death of the said Arthur F. Davis, as aforesaid, she gave the defendant due notice and proof of the said death and duly and faithfully performed all the terms, stipulations and requirements imposed by the terms of said certificates or contract of insurance, but that the defendant failed, neglected and refused, although thereunto by the
5 plaintiff requested, to perform all or any part of the obligations incurred by it by reason of said certificate or contract of insurance and denied all liability under said certificate or contract of insurance and has refused and neglected to pay the plaintiff the sum of five thousand ($5000.00) dollars, although the same has been duly demanded.

That by reason of the premises there is due by the defendant company to the plaintiff the sum of five thousand ($5000.00) dollars, together with interest thereon at six per cent. per annum from and after February 1st, 1907.

Wherefore, plaintiff prays judgment against defendant for the sum of five thousand ($5000.00) dollars together with interest thereon at the rate of six per cent. per annum from and after February 1st, 1907, and for costs of this suit.

A. W. WALKER,
SCARRITT, SCARRITT & JONES,
Attorneys for Plaintiff.

And on the same date aforesaid, summons was also issued directed to the Sheriff of Howard County, Missouri, which said summons and the return of the Sheriff, are as follows:—

STATE OF MISSOURI, *County of Howard, ss:*

In the Circuit Court.

The State of Missouri to the Sheriff of Howard County, Greeting:

We command you to summon The Commercial Mutual Accident Company, a corporation, if it be found in your County, to appear before our Circuit Court, to be begun and holden within and for the County of Howard, at the Court house, in the City of Fayette, in said County, on the first day of the next term thereof, to be begun and held on the first Monday in April next, A. D. 1907, then and there, before the Judge of our said Court, to answer the petition of Mary B. Davis. And have you then and there this writ, with the return of your action thereupon.

6 Witness my hand as Clerk of said Court, and the seal thereof. Done at office in Fayette, in said County aforesaid, on the 27th day of February, A. D. 1907.

[L. S.]

N. F. FRAZIER, *Clerk,*
By A. L. KIRBY,
Deputy Clerk.

Sheriff's Return.

Executed the within Writ in the County of Howard and State of Missouri, on the 27th day of February, A. D. 1907, by delivering a copy of the petition in this case hereto attached and a copy of this writ to Frank G. Mason, agent of the within named defendant, the Commercial Mutual Accident Company, a corporation organized under the laws of the State of Pennsylvania, and doing business in this State, but having no office or place of business herein, and not incorporated under the laws of this State nor authorized to do business in this state, and while he, the said agent, was transacting business for the said defendant in our said county, and while he was adjusting or settling a loss on a policy of insurance for said defendant or was aiding and assisting in so doing.

GEO. D. GIBSON,
Sheriff Howard County, Mo.,
By H. L. HUGHES, *Deputy.*

Fee $1.00.

And afterwards, to wit, on the 1st day of March, 1907, it being in vacation of said Court, the following further proceedings were had and entered of record in said cause, to-wit:

MARY B. DAVIS, Plaintiff,
vs.
THE COMMERCIAL MUTUAL ACCIDENT COMPANY, a Corporation, Defendant.

Now at this day comes the defendant herein, by attorney, and files its petition and bond for removal of said cause to the United States Circuit Court Central division of the Western District of Missouri, which said petition and bond are as follows, to-wit:

7 In the Circuit Court of Howard County, Missouri, at Fayette.

MARY B. DAVIS, Plaintiff,
vs.
THE COMMERCIAL MUTUAL ACCIDENT COMPANY, a Corporation, Defendant.

Petition.

To the Honorable Circuit Court of Howard County, Missouri:

Now on this day comes The Commercial Mutual Accident Company, a corporation, the above named defendant, and files this its petition for removal of the above entitled cause to the Circuit Court of the United States in and for the Central Division of the Western District of Missouri, and respectfully shows to the court,

That your petitioner is defendant in the above entitled cause;

That said action has been commenced against your petitioner in your said court by the above named plaintiff, and that said action is of a civil nature.

That the matter and amount in dispute in this action exceeds the sum or value of Two Thousand Dollars ($2000), exclusive of interest and costs.

That the time for your petitioner as defendant in this action to answer or plead to the petition in said action has not expired and will not expire until the first Monday in April next A. D. 1907. Your petitioner has not yet filed any answer or plea, nor has your petitioner in any way appeared in said action.

8 That the said plaintiff, Mary B. Davis, is now and was at the time of the commencement of this suit a citizen and resident of the State of Missouri and your petitioner, the defendant, was at the time of the commencement of this suit and still is a corporation organized and existing under the laws of the State of Pennsylvania, having its home office and chief place of business in the City of Philadelphia in the State of Pennsylvania, and that your petitioner, the defendant, was at the time of the commencement of this suit and still is a citizen and resident of the State of Pennsylvania.

Your petitioner herewith offers a bond with good and sufficient surety for its entering in said court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court of the United States if said court shall hold that this case was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein except to make an order for the removal of this cause to said Circuit Court of the United States and to accept said surety and bond and to cause the record herein to be removed to the Circuit Court of the United States in and for the Central Division of the Western District of Missouri, and it will ever pray.

THE COMMERCIAL MUTUAL ACCIDENT COMPANY,
By J. C. ROSENBERGER AND
KERSEY COATES REED, *Its Attorneys.*

9 STATE OF MISSOURI, *County of Jackson, ss:*

J. C. Rosenberger being first duly sworn, on oath states, that he is attorney for the above named defendant in the above entitled cause; that he has read the foregoing petition and believes the same to be true; that said petitioner is a corporation having its chief office and place of business in Philadelphia, Pennsylvania; and that all of its officers are non-resident and absent from the State of Missouri, and that affiant makes this affidavit for the reason that the defendant and all of its officers are non-resident and absent from the State of Missouri in which state suit is brought.

J. C. ROSENBERGER.

Subscribed and sworn to before me, a notary public in and for Jackson County, Missouri, on this the 28th day of February, 1907.
My term expires on the 7th day of November, 1909.
[SEAL.] BEN. R. ESTILL,
Notary Public.

10 In the Circuit Court of Howard County, Missouri, at Fayette.

MARY B. DAVIS, Plaintiff,
vs.
THE COMMERCIAL MUTUAL ACCIDENT COMPANY, a Corporation, Defendant.

Bond for Removal of Cause.

Know all men by these presents, that we, The Commercial Mutual Accident Company, a corporation, as principal, and the United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto Mary B. Davis, plaintiff in the above entitled cause, her heirs and assigns, in the sum of Five Hundred Dollars ($500), lawful money of the United States of America, for the payment of which, well and truly to be made, we and each of us bind ourselves, and each of us, our successors and assigns, jointly and severally by these presents.

The conditions of this obligation are such that:

Whereas, the said, The Commercial Mutual Accident Company, has applied by petition to the Circuit Court of Howard County, in the State of Missouri, for the removal of a certain cause therein pending, wherein said Mary B. Davis is plaintiff, and the above named corporation is defendant, to the Circuit Court of the United States for the Central Division of the Western District of Missouri, as in said petition set forth.

Now, therefore, if your petitioner, the said The Commercial Mutual Accident Company, shall enter in said Circuit Court of the United States for the Central Division of the Western District of Missouri, aforesaid, on or before the first day of the next regular session, a copy of the record in said suit, and shall pay or cause to be paid all costs that may be awarded therein by the said
11 Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise shall remain in full force and effect.

THE COMMERCIAL MUTUAL ACCIDENT COMPANY,
By J. C. ROSENBERGER, *Its Attorney.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND,
[SEAL.] By JAS. VAN BUREN, JR., *Its Attorney in Fact.*

[Endorsed:] Mary B. Davis *v.* Commercial Mutual Acc. Company. Office copy Pet. & Bond for Removal of Cause to U. S. Circuit Court.

12 STATE OF MISSOURI, *County of Howard, ss:*

I, W. C. Thomas, Clerk of the Circuit Court and *Ex-Officio* Recorder, within and for the County of Howard and State of Missouri, hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings of said Court in the above entitled cause, as the same remains of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Fayette, this 5th day of March, 1907.

[SEAL.] N. F. FRAZIER,
Clerk of the Circuit Court, Howard County, Missouri,
By A. L. KIRBY, *Deputy.*

Afterwards, to wit, on the 29th day of April, 1907, the following entry appears of record:—

3170.

MARY B. DAVIS
vs.
THE COMMERCIAL MUTUAL ACCIDENT CO.

Now on this day comes defendant by its attorneys and files an amended motion to quash return of sheriff and affidavits in support thereof and said motion coming on for hearing the same is argued by counsel and is submitted to the Court and by the Court taken under advisement.

Afterwards, to wit, on the 30th day of April, 1907, the following entry appears of record:—

3170.

MARY B. DAVIS
vs.
THE COMMERCIAL MUTUAL ACCIDENT CO.

The motion to quash the return of the Sheriff having been submitted to the Court and taken under advisement, now the Court being fully advised in the premises doth order that said
13 motion be and it is hereby overruled, to which action of the Court defendant excepts.

Leave is granted defendant to file bill of exceptions within 30 days.

It is further ordered that defendant file answer or demurrer within 10 days.

Afterwards, to wit, on the 2nd day of May, 1907, the following entry appears of record:—

3170.

MARY B. DAVIS
vs.
COMMERCIAL MUTUAL ACCIDENT CO.

This day comes defendant by its attorneys and files bill of exceptions herein.

Afterwards, to wit, on the 13th day of May, 1907, the same being a day of the regular April term of said court, the following entry appears of record:—

3170.

MARY B. DAVIS
vs.
THE COMMERCIAL MUTUAL ACCIDENT COMPANY.

Now on this day this cause coming on regularly for trial comes the plaintiff by W. C. Scarritt, Esquire, her attorney, and the defendant though duly summoned and served with process according to law, and duly called, comes not but makes default and the plaintiff waives a jury herein and the defendant by not appearing is deemed to waive a jury, and this cause is submitted to the court upon the pleadings and the proofs, and the Court having heard the evidence and being fully advised in the premises doth find that the defendant is a corporation organized under the laws of the State of Pennsylvania, and that at the time of service of process herein upon it it had no office or place of business in this state, and was not authorized to do business in this state by the Superintendent of Insurance of this State, and that it, the said defendant, then had,
and for a long time prior thereto had, a large number of
14 insurance policies outstanding upon citizens of this State,
and at such time it was doing business in this State and had an agent in this State with full authority to adjust or settle a loss and to pay the same for the defendant corporation, and which said agent, viz: Frank G. Mason, on whom service of process for defendant was had, was at the time of such service of process engaged in adjusting or settling a loss on the policy of insurance sued on in this action, or was aiding and assisting in so doing in this State.

And the Court doth find the issues for the plaintiff and against the defendant and that the plaintiff is entitled to recover of the defendant upon her petition the sum of five thousand sixty two dollars and fifty cents, together with interest on said sum from this date at the rate of six per cent. per annum, and costs of suit.

Wherefore, it is considered, ordered and adjudged by the Court that the plaintiff have and recover of and from the defendant the sum of five thousand sixty two dollars and fifty cents, with interest thereon from the date hereof at the rate of six per cent. per annum until paid and the costs of this suit, which are now taxed at Forty Six and 90/100 dollars, and that she have thereof execution.

And afterwards, to wit, on the 7th day of June, A. D. 1907, the following entry appears of record:—

3170.

MARY B. DAVIS
vs.
COMMERCIAL MUTUAL ACCIDENT COMPANY.

Now on this day comes the defendant by its attorneys and files herein and presents to the Court its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by it praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as are proper in the premises.

15 On consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law in the sum of six thousand ($6000.00) dollars, which bond shall operate as a supersedeas. Said writ of error is allowed in order that the said Supreme Court may review the single and definite question as to whether there has been such service of process upon the defendant in this cause as to confer upon the Circuit Court the right, power and jurisdiction to render judgment against defendant,—that is to say, the question as to whether the Circuit Court erred in overruling defendant's amended motion to set aside the return of service made by the Sheriff of Howard County, Missouri, to the writ of Summons in this cause and in thereafter taking and exercising jurisdiction in this cause.

The Assignment of Errors filed herein on the 7th day of June, A. D. 1907, is in words and figures as follows:—

16 In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

No. 3170.

MARY B. DAVIS, Plaintiff,
vs.
COMMERCIAL MUTUAL ACCIDENT COMPANY, Defendant.

Assignment of Errors.

The defendant in this action in connection with its petition for writ of error makes the following assignment of errors which it avers occurred in the proceedings in this cause:

First. The court erred in overruling defendant's amended motion to quash the return of service made by the sheriff of Howard

County, Missouri, to the writ of summons in this cause and to set aside said return and to dismiss this cause for want of jurisdiction.

Second. The court erred in conceiving that it had jurisdiction over the person of defendant in this cause.

Third. The court erred in conceiving that it had jurisdiction to render a personal judgment against defendant, and in conceiving that the service of summons herein was such as to give the court power or jurisdiction to enter judgment against defendant.

Fourth. The court erred in that after it had overruled and denied the motion aforesaid to set aside the service of summons it rendered judgment against this defendant, because said court had no power or jurisdiction to render said judgment.

Fifth. The court erred in conceiving and holding that Frank G. Mason, the person upon whom the summons was attempted to be served, was such an agent of defendant as was authorized to
17 receive service of process on its behalf.

Sixth. The court erred in conceiving and holding that defendant was so engaged in the transaction of business within the State of Missouri as to make it amenable to this suit and to process herein.

Seventh. The court erred in conceiving and holding that the service of summons was valid under the statutes of the State of Missouri.

Wherefore the defendant prays that said Judgment be reversed, annulled and altogether held for nothing and that it may be restored to all things which it hath lost by occasion of the actions of the court aforesaid.

ROSENBERGER & REED,
Attorneys for the Defendant.

18 The petition for writ of error filed herein on the 7th day of June, A. D. 1907, is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

No. 3170.

MARY B. DAVIS, Plaintiff,
vs.
COMMERCIAL MUTUAL ACCIDENT COMPANY, Defendant.

Petition for Writ of Error.

And *how* comes the above named defendant herein and says:

That on or about the 13th day of May, 1907, the circuit court aforesaid entered a judgment herein in favor of the plaintiff and against this defendant, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from an assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Said writ of error is sued out to review solely the question as to whether the said circuit court had right, power or jurisdiction to enter the said judgment,—that is to say, the question as to whether said circuit court had such jurisdiction over the person of defendant as to authorize the rendition of the judgment aforesaid.

ROSENBERGER & REED,
Attorneys for the Defendant.

19 The certificate of the Judge filed herein on the 7th day of June, A. D. 1907, is in words and figures as follows:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

No. 3170.

MARY B. DAVIS, Plaintiff,
vs.
COMMERCIAL MUTUAL ACCIDENT COMPANY, Defendant.

Certificate of Judge that a Question of Jurisdiction is Involved in this Cause.

I hereby certify to the Supreme Court of the United States solely the question as to whether there has been such service of process upon defendant in this cause as to authorize this court to take and exercise jurisdiction over defendant. Said question arose on defendant's amended motion to set aside the return of service made by the sheriff of Howard County, Missouri, to the writ of summons herein and to dismiss this cause for want of jurisdiction over defendant. This court, conceiving that the service of said summons upon defendant was valid and sufficient to give this court jurisdiction, overruled said motion, proceeded to exercise said jurisdiction and rendered final judgment against defendant. No opinion was filed by the court.

This certificate is made conformably to act of Congress of March 3, 1891, Chapter 517, on this 7th day of June, A. D. 1907.

(Signed) SMITH McPHERSON, *Judge.*

[Endorsed:] Davis *v.* Commercial Mutual. Give these to Miss Utter for her use in making transcript.

20 The Bond for Writ of Error, approved and filed herein on the 7th day of June, A. D. 1907, is in words and figures as follows, to wit:—

UNITED STATES OF AMERICA, *ss:*

Know all Men by These Presents, That we The Commercial Mutual Accident Company (a corporation) and the Fidelity and Deposit Company of Maryland (a corporation) are held and firmly bound unto Mary B. Davis her Executors and Administrators in the sum of Six thousand ($6000.00) Dollars to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 7th day of June A. D. 1907. Upon this express condition to wit: Whereas, The above named Commercial Mutual Accident Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the cause above named by the Circuit Court of the United States for the Western Division of the Western District of Missouri. Now if the above named Commercial Mutual Accident Company shall prosecute its said writ of error to effect and answer all damages including just damages for delay, interest and costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

COMMERCIAL MUTUAL ACCIDENT COMPANY, [SEAL.]
By ROSENBERGER & REED, [SEAL.]
Its Attorneys.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By J. V. C. KARNES, *Attorney in Fact.* [SEAL.]

[SEAL.]

Attest:

ED. M. SMITH,
General Agent.

The above bond is hereby approved and ordered to be filed and made a part of the record, and the filing of the above bond shall serve as a supersedeas.

(Signed) SMITH McPHERSON, *Judge.*

21 The bill of exceptions filed herein on the 2nd day of May, A. D. 1907, is in the words and figures following, to wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3170.

MARY B. DAVIS, Plaintiff,
vs.
COMMERCIAL MUTUAL ACCIDENT COMPANY, Defendant.

Bill of Exceptions.

Be it remembered, That on the 25th day of March, 1907, defendant filed herein its motion to set aside and quash the return upon the writ of summons herein, which said motion is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Central Division of the Western District of Missouri.

MARY B. DAVIS, Plaintiff,
vs.
THE COMMERCIAL MUTUAL ACCIDENT COMPANY, Defendant.

Motion to Quash Return of Sheriff of Howard County, Missouri.

Now comes the above named defendant appearing specially for the purposes of this motion only, not admitting but on the contrary denying that this court has or can have any jurisdiction over this defendant, and moves the court to quash the pretended return to the writ of summons in this case made by the sheriff of Howard County, Missouri, because said return does not show that this defendant has been served with process in the manner required by the statute in such case made and provided, and this defendant shows to the court that said return of said sheriff is false in this that defendant is not now doing, nor has it ever done any business in this state, and that Frank G. Mason, the pretended agent of de-
22 fendant, as by said sheriff alleged, is not and never was the agent of this defendant, and the return of said sheriff falsely states that said summons was served upon said Mason while he was adjusting or settling a loss on a policy of insurance for this defendant, or while he was aiding or assisting in so doing, and defendant states that in truth and in fact this defendant is a corporation organized and existing under the laws of the State of Pennsylvania and is there engaged in the business of insurance. That at no time has this defendant, or any person in its behalf, solicited insurance on its behalf in the State of Missouri, or made any contract of insurance or collected or received any premium for insurance within the State of Missouri. That no person or persons have at any time in this state receipted for any money on account of or for any contract of insurance made by such person or persons for this defend-

ant; that no person or persons have at any time receipted for any money from other persons to be transmitted to this defendant either in or out of this state for any policy or policies of insurance issued by this defendant or for any renewal thereof, and that no person has made or caused to be made directly or indirectly in this state any contract of insurance for this defendant, and that no person has at any time within this state for defendant solicited any applications or delivered policies or renewal receipts, or collected premiums thereon, or received or collected any moneys from any source or on any account whatsoever for this defendant; that this defendant has not now nor has it ever had any office or place of business in this state.

Wherefore, defendant prays that said return of said sheriff be quashed, set aside and for naught held.

ROSENBERGER & REED,
Attorneys for Defendant.

On the back of said Motion to Quash Return of Sheriff of Howard Co., Mo., appears the following:

22½ No. 3170 U. S. Circuit Court, Central Division Western District Missouri. Mary B. Davis, Plaintiff *vs.* Commercial Mut. Acc. Co., Defendant. Motion to Quash Return of Sheriff of Howard Co., Mo. Filed Mar 9 1907 H. C. Geisberg, Clerk Filed March 25, 1907 Adelaide Utter, Clerk. Rosenberger & Reed, Attorneys for defendant.

On the 29th day of April, 1907, defendant filed herein its Amended motion to quash the return of service herein made by the sheriff of Howard County, Missouri, which said amended motion is in words and figures as follows, to wit:

23 In the Circuit Court of the United States for the Central Division of the Western District of Missouri, at Jefferson City.

MARY B. DAVIS, Plaintiff,
vs.
COMMERCIAL MUTUAL ACCIDENT COMPANY, Defendant.

No. 2319.

Amended Motion to Quash Return of Sheriff of Howard County to Writ of Summons Herein.

Now comes the above defendant and appearing specially for the purposes of this motion only, not confessing, but on the contrary, denying that this court has any jurisdiction over the person of this defendant, and moves that the return of the sheriff of Howard County, Missouri to the writ of summons in this cause be quashed, set aside and for naught held, and that this cause be dismissed for want of jurisdiction for the following reasons, to-wit:

1. That said return falsely recites that this defendant at the time of the pretended service of said writ was doing business in the State of Missouri.

2. Because Frank G. Mason, the person upon whom the pretended service of the writ of summons herein was made was not such an agent of defendant upon whom legal service of said writ could be made, and said Frank G. Mason is not now and never was an agent of defendant authorized to receive service of process on behalf of defendant.

3. Because said Frank G. Mason, the person named in said return, was induced to come from the State of Illinois into the State of Missouri by a trick and device conceived and executed by the plaintiff herein in order that said writ might be delivered to him.

24 4. Because said return falsely recited that said Frank G. Mason was at the time of the pretended service of said writ adjusting or settling a loss on a policy of insurance for defendant.

5. Because said return falsely recites that said Frank G. Mason at the time said pretended service was made was aiding or assisting in adjusting or settling a loss on a policy of insurance for defendant.

6. Because said return fails to show that said writ of summons was served in accordance with the statute in such case made and provided.

7. Because said Frank G. Mason has never adjusted or settled a loss on a policy of insurance for defendant, and therefore could not have aided or assisted in so doing.

And hereof defendant prays the judgment of the court as aforesaid.

ROSENBERGER & REED,
Attorneys for Defendant.

To above named plaintiff:

You will hereby take notice that defendant will file the foregoing amended motion to quash the sheriff's return in the above entitled cause.

ROSENBERGER & REED,
Attorneys for defendant.

Said amended motion came on to be heard by the court on the 29th day of April 1907 and upon the hearing thereof the defendant offered in evidence the affidavit of Frank G. Mason; also the affidavit of H. B. Meininger, which said affidavits were filed in this court on April 29, 1907, and are in words and figures as follows, to-wit:

25 In the Circuit Court of the United States for the Central Division of the Western District of Missouri, at Jefferson City.

MARY B. DAVIS, Plaintiff,
vs.
COMMERCIAL MUTUAL ACCIDENT COMPANY, Defendant.

No. 2319.

STATE OF ILLINOIS, *County of Cook, ss:*

Frank G. Mason of lawful age, being duly sworn on oath states: My name is Frank G. Mason. I am a graduate of a regular allopathic medical institution and am by profession a practicing physician and surgeon. I have practiced my profession continuously in the City of Chicago, Illinois fifteen years. I have an office at Room 616 Stewart Building, 92 State Street in said City of Chicago, and at my office I receive, treat and consult with my patients and transact the ordinary business of a physician there. My residence is at 474 West Congress Street in said City of Chicago. I am not now and never have been regularly or continuously in the employ of the above named defendant, but have occasionally performed, when so requested by defendant, services for it in the way of making medical examinations and reports concerning persons insured with defendant who have met with accidental injury and who have had claims pending against defendant. I have not and never have had any contract of employment with defendant. I receive no salary from the defendant but am paid for my services in each particular case according to what the services may be reasonably worth. I have never had such contract relations with
26 defendant as obligated me to act for it in any case, and have always been free when requested by defendant to act for it in making investigations etc. to either accept or decline the engagement as I saw fit. The claims I have investigated for defendant have been few and far between. In the year 1904 I acted for the defendant as aforesaid in one case only. In the year 1905 I acted for the defendant in the capacity aforesaid in one case only. In the year 1906 I acted for the defendant in the capacity aforesaid in three cases only, and in the year 1907 and up to the time the attempted service of process was made on me in this suit I had attended to no cases whatsoever for the defendant nor transacted any business for them. I have never had general authority to settle or adjust claims on behalf of defendant, and if in any instance an offer of compromise had been made to me I had no right or power to bind the company with respect thereto, unless special authority was given me by the company to settle or adjust that particular case, and in such instances the only power I had was to inform the company of the proposition. Each instance in which I have performed any service for the company has been treated by both myself and the company as a separate and distinct item, there being no continuous relationship between me and the said company.

On or about the 12th day of January, 1907, I was requested by Mr. H. B. Meininger, Secretary and General Manager of the above named defendant, to go from my home in Chicago, Illinois, to the Town of Fayette in Howard County, Missouri, for the purpose of investigating the nature and extent of alleged accidental injuries alleged to have been sustained by one A. F. Davis, late husband of the plaintiff herein, which injuries it was claimed had resulted in the death of said A. F. Davis, and to investigate the circumstances under which said injuries had been inflicted.

27 Pursuant to said request, I visited said town of Fayette on or about the 14th day of January, 1907, and made inquiry into the facts surrounding the said death, and during said investigation I was credibly informed that the deceased was sixty-four years of age; that for many years he had suffered with a nervous affection and that he was not in robust health. That although a man of moderate fortune he carried life insurance policies on his life aggregating $133,000, and accident insurance upon his life aggregating $16,000, or a total of $149,000. That at about 4:30 o'clock on the morning of December 31, 1906, he entered the bath room of his residence in Fayette, Missouri, and while alone in said bath room, said A. F. Davis received the injuries from which it was alleged his death had ensued; that said injuries had not been at first regarded as serious, and that deceased had died on the morning of January 4, 1907. I interviewed the various physicians who had been in attendance upon the case, and taking into consideration the nature of the examinations made by them as related by them to me of the injuries, both before and after the death of said deceased, and taking into consideration the impaired physical condition of the deceased at the time of the alleged accident, I felt that it had not been established that the injuries alone had caused his death. I felt that in order to ascertain the cause of death it would be necessary that I examine the body of the deceased. I had learned in the course of my investigation that no thorough examination had been made of the body after death and that only a superficial examination had been made. I had been provided with a copy of the policy upon which this suit is brought and knew that said policy reserved to the defendant the right to make an examination of the body of said Davis in respect to any alleged injury or cause of death. The said A. F. Davis had made certain warranties in his application

28 to defendant for the insurance respecting his physical condition, and it was my opinion that my duty required me to examine the body of said Davis to ascertain to what extent his impaired physical condition had contributed to his death, there having been in my judgment a breach of warranty committed by the said A. F. Davis in his application for the insurance with respect to his previous state of health.

I further found that the body of said Davis had been buried before plaintiff or any one in her behalf had notified the defendant of any alleged accident or that any claim was to be made. I accordingly requested plaintiff to accord me the right to examine the body of said Davis, which request was by the plaintiff and her representatives refused. And thereupon, being unable to complete my in-

vestigation by reason of said refusal, I returned to my home in Chicago, arriving there on January 16, 1907, and made report to the defendant.

At none of the times aforesaid had any authority been conferred upon me by the defendant to settle or compromise the claim of plaintiff, and if any suggestion of compromise had been made at any of said times I would have had no power to deal with the same otherwise than by transmitting the same to the officers of the defendant at its home office, if I saw fit so to do, nor was I under any obligation to even do that.

After my return to Chicago on January 16, and after I made my report to the company I gave no further attention to this case until on or about February 24, 1907, I was again requested by the defendant to go to Fayette, Missouri, the defendant furnishing me with a copy of the following letter received by it from the plaintiff herein, and copy of its reply by it to plaintiff, to-wit:

29 "FAYETTE, MISSOURI, *Feb'y* 20, 1907.

Commercial Mutual Accident Insurance Co., Philadelphia, Pa.

GENTLEMEN: In reply to your favor of the 6th will say that I am very sorry that you still insist on having some one examine the body of my deceased husband, as I hoped you would be satisfied with the examination of these doctors here as they are physicians of high standing and fully competent to hold such an examination.

However, if you think it is right you may send some one here to examine the body for you. Can't you also send some one authorized who could settle the claim here if your doctor found everything as reported, as most all of the claims have been paid and I am very anxious to have the balance settled as soon as possible.

Then, too, if I should want to compromise the claim in lieu of an examination, your agent would have power to settle it without any delay. Please let me know just when you will send some one as I am thinking of going to St. Louis for a few days and would like to be here when he comes, so let me know several days in advance.

Yours very truly, MRS. MARY B. DAVIS.

PHILADELPHIA, *February* 22, 1907.

Mrs. Mary B. Davis, Fayette, Mo.

DEAR MADAM: Your letter of February 20th has been received.

We shall immediately arrange to have our medical repre-
30 sentative in Fayette as soon as possible. He will have authority to make an adjustment, should that course be advisable.

Very truly yours, HORACE B. MEININGER,
Secretary.

The company also furnished me with the following letter addressed to the plaintiff, the same to be exhibited to her in case she requested it:

PHILADELPHIA, *February* 22, 1907.

Mrs. Mary B. Davis, Fayette, Mo.

DEAR MADAM: The bearer, Frank G. Mason, is fully authorized to act on behalf of this company in relation to a post mortem examination on the body of your late husband, Mr. Arthur F. Davis, and is also authorized to adjust the claim.

Very truly yours,

HORACE B. MEININGER, *Secretary.*

Until receipt of said letter of February 22, 1907, I had had no authority whatsoever to settle or adjust plaintiff's claim.

Having noted plaintiff's request in her above quoted letter of February 20 asking that she be advised when the company would have its physician in Fayette, I on February 25, 1907, telegraphed to Mrs. Davis, the plaintiff, as follows:

"Will it be convenient to see me to-morrow, Tuesday morning?"

On the same day I received a reply by telegraph, signed
31 M. H. Davis and reading as follows:

"Come Wednesday morning."

Believing that plaintiff when she wrote the above letter of February 20, 1907, in good faith intended to permit an examination to be made of the body of the deceased, I before leaving Chicago arranged with Dr. Lee Shaw, an eminent surgeon of Chicago, to meet me at Fayette upon telegraphic notice, and there assist me in making said examination of said body. The Wednesday referred to in the aforesaid telegram from plaintiff or her agent, inviting me to come to Fayette, was February 27, 1907.

In response to said invitation, I left Chicago on the evening of February 26th, 1907, and arrived at Fayette on the morning of February 27th. Shortly after I arrived at the hotel at Fayette, to-wit, at 9:35 A. M., I was called to the telephone by Mr. M. H. Davis, a son of plaintiff, who said over the telephone, "You are here, are you?" I assured him I was, and he asked me to come over to the Farmers & Merchants Bank of Fayette, with which he is connected. I told him I would be there in the course of about half an hour. At 10:10 A. M. said M. H. Davis, and Dr. Givens, a former partner of the deceased and at one time his family physician, called on me at the hotel with a gentlemen whom said Davis introduced as his friend, Mr. Scarritt. Nothing was said as to Mr. Scarritt being one of the attorneys for the plaintiff or that he had come to Fayette from Kansas City, Missouri on the business, nor did I know this fact until later. Mr. Scarritt thereupon opened the conversation by asking me if I still desired to make an examination of the body of A. F. Davis. Upon being answered in the affirmative, he asked me if there was not some chance to get together on a compromise. I told him I preferred not to discuss that matter at that time. After some further talk he
32 asked me if I was authorized to make a settlement or autopsy.

I answered in the affirmative, and he thereupon asked me if I had any credentials. Whereupon I produced the above quoted

letter of February 22, 1907 addressed to plaintiff by the defendant beginning as follows: "The bearer Mr. Frank G. Mason, etc."

Thereupon Mr. Scarritt made me an offer of compromise which I declined and I made him a counter-proposal. The words had hardly left my mouth when Mr. Scarritt called Dr. Givens to one side and immediately two men, strangers to me, came into the room from the barber shop in the rear of the hotel, one of whom was a deputy sheriff who then and there delivered to me the summons in this case and also a notice that depositions would be taken in this case at Fayette, Missouri on March 4, 1907 on behalf of the plaintiff; also a subpœna commanding me to appear before one Kirby, a notary public, at the law office of A. W. Walker, one of plaintiff's attorneys, in the city of Fayette, at 10 o'clock in the forenoon of March 4, 1907, and then and there to testify as a witness in this cause.

Said deputy sheriff appeared very much agitated at the time he was delivering said papers to me and it was apparent that he had been under instructions of plaintiff and her counsel waiting for a signal from one of those present directing the delivery to me of said papers. I then learned that Mr. Scarritt was an attorney of Kansas City, Missouri, a member of the law firm of Scarritt, Scarritt & Jones, with offices in the American Bank Building in Kansas City, Missouri, is a relative of plaintiff, and that he had been consulted as counsel prior to my arrival in Fayette; that he had come to Fayette on this business and that the petition in this cause had been prepared prior to my arrival in Fayette, and that said petition had been filed in the Circuit Court of Howard County at Fayette prior to the time
33 of my conversation aforesaid with said Scarritt in the hotel.

Before leaving Fayette I made written demand on plaintiff for leave to examine the body of said A. F. Davis and was referred by plaintiff to said Dr. Givens for her answer, and said Dr. Givens on behalf of plaintiff refused to permit said examination of said body to be made. Finding that plaintiff's invitation to me to visit Fayette had been merely a ruse to get some person into Missouri whom plaintiff could pretend was an agent of defendant for the purpose of receiving service of process, I immediately telegraphed to Dr. Shaw of Chicago cancelling my arrangements with him and left Fayette.

At none of the times aforesaid did I have any authority to employ counsel on behalf of the defendant, and after said summons and said notice to take depositions and said subpœna were delivered to me as aforesaid the company directed me to turn the papers over to Mr. J. C. Rosenberger, attorney at law, New York Life Building, Kansas City, Missouri, which, on the following day, February 28, 1907, I accordingly did and immediately returned to my home in Chicago. I never had, nor did I assume, any authority to employ Mr. Rosenberger as counsel. That matter was left by me to the company to dispose of as it saw fit; nor did I see Mr. Rosenberger until after I had been specifically directed to do so by the defendant.

I have seen the pretended return of the sheriff of Howard County, Missouri upon the writ of summons in this cause. It is not true that I am or ever have been the agent of the above named defendant, or that I have ever represented it in any way except in the limited

and special manner hereinabove set forth. My entire connection with the case is as hereinabove set forth. I have never adjusted or settled a loss on any policy of insurance for defendant or aided or assisted in so doing in the State of Missouri. I came into the
34 State of Missouri solely under the circumstances hereinabove set forth and for no other purpose.

FRANK G. MASON.

Subscribed and sworn to before me, a notary public, within and for the County of Cook, State of Illinois, on this the 22nd day of March, 1907.

My commission expires Nov. 16, 1907.

[SEAL.] GEORGE H. MASON,
Notary Public.

35 In the Circuit Court of the United States for the Central Division of the Western District of Missouri, at Jefferson City.

No. 2319.

MARY B. DAVIS, Plaintiff,
vs.
THE COMMERCIAL MUTUAL ACCIDENT COMPANY, Defendant.

COUNTY OF PHILADELPHIA, *State of Pennsylvania, ss:*

Horace B. Meininger of lawful age, being duly sworn, on oath says:

I am and have been since January 1, 1903, secretary and general manager of the above named defendant. I reside at Philadelphia in said county and state. As such secretary I have had and still have charge of the books, records and correspondence of the defendant, passing upon applications for insurance and paying or adjusting claims under policies issued by the defendant, all subject to the approval and direction of the board of directors of defendant, and am familiar with all departments of its business and operations. The chief office of defendant is located in the said County of Philadelphia in said state.

Defendant was incorporated under the laws of the State of Pennsylvania November 7, 1888, for the purpose, as expressed in its by-laws, of collecting and accumulating a fund for the mutual
36 benefit and protection of its members out of which should be paid to them or the beneficiaries named by them such indemnity in case of their injury or death through external, violent and accidental means, or sickness, as should be provided and designated in their respective certificates of membership, and also the expenses of conducting the business of the company.

Defendant has never issued or delivered within the State of Missouri a contract of insurance to any person.

Defendant has never had any office or place of business or any property in the State of Missouri.

No person has within the State of Missouri, at any time, to my knowledge, receipted for any money on account of or for any contract of insurance made by such person for defendant, and no person to my knowledge has ever receipted within the state of Missouri for any money from other persons for transmission to defendant.

No person has ever been appointed to act as agent for this defendant within the State of Missouri, nor has any person acted as such agent for defendant within the State of Missouri, and no person has within the State of Missouri as such agent solicited applications, delivered policies, or renewal receipts, or collected premiums thereon or received or collected moneys from any source or on any account whatsoever as such agent for defendant within the State of Missouri.

Accordingly, by reason of the premises, defendant has never had occasion to apply to the proper officer of the State of Missouri for authority to transact business in said state, and defendant company has never been authorized or licensed to transact business in the State of Missouri, nor has defendant ever appointed the superintendent of insurance of the State of Missouri or any other person to
37 receive or accept service of process within the State of Missouri.

Defendant has at this time upwards of 5913 members holding certificates of insurance, and out of the whole number of such members only 21 reside in the State of Missouri. The 21 certificates of insurance held by citizens of Missouri were in the main issued more than four years ago and some as long as ten years ago. The instances in which this defendant has issued certificates of insurance to residents of the State of Missouri are few and sporadic, and while this defendant has not refused applications for insurance made by citizens of Missouri, it has made no special effort to induce such persons to become members, and such certificates as have been issued by defendant to such persons residing in the State of Missouri have been the result largely of the good-will, and reputation of this defendant and not through any systematic solicitation by this defendant, and although this defendant does a large and extensive business, frequently as long as six months elapse without any applications for insurance being received from any resident of the State of Missouri. In every instance in which this defendant has issued certificates of insurance to residents of Missouri, the persons insured have applied for such insurance in writing sent through the mails from Missouri to defendant at its home office in Philadelphia, Pennsylvania, and in each of said instances said applications have been acted upon at Philadelphia, and when accepted the respective certificates of membership were made out in Philadelphia and sent through the mails from Philadelphia to Missouri without the intervention in Missouri of any person in the service of defendant. Each and all of said transactions were transacted wholly by correspondence through the mails and in each of said instances membership
38 fees, premium calls or assessments were paid to defendant at Philadelphia where the same were received by defendant through the mails, and the same is true with respect to the policy issued to said A. F. Davis, the insured in this case. None of the

directors, officers or agents of the defendant reside in Missouri and defendant has never adjusted or paid any claims under its certificates in Missouri through any officer, agent or representative. The application for membership made to defendant by said A. F. Davis is hereto attached, marked Exhibit "A". A form of the insurance contract issued to said A. F. Davis by defendant is hereto attached marked Exhibit "B", the same being complete with the exception of dates, names and signatures.

My attention has been called to the return of service made by George D. Gibson, sheriff of Howard County, Missouri of the summons in said case. It is not true that Frank G. Mason, mentioned in said return as agent of said defendant is or ever was in any true or legal sense the agent of defendant, and it is not true that said sheriff delivered said summons to him while he was adjusting or settling a loss on any policy issued by defendant, or while he was aiding or assisting in so doing. The facts in this matter are these:

On or about January 9, 1907, the defendant received from plaintiff herein a letter dated January 7, 1907, in words and figures as follows, to-wit:

FAYETTE, Mo., *Jan'y* 7, 1907.

Commercial Accident Insurance Co., Philadelphia, Pa.

GENTLEMEN: Mr. A. F. Davis was accidentally shot on the 31st of December 1906 and died on the 4th day of Jany. 1907 as the result of it.

I find that he held a policy in your company for $5000.00, Number 16048.

Please send proofs of death to be executed, and oblige,

Yours very truly, M. H. DAVIS.

39 On or about January 10, 1907, I, on behalf of defendant, directed Dr. Frank G. Mason of Chicago, Illinois, to go to Fayette, Missouri, the home of plaintiff, and there make investigation into the death of said A. F. Davis and cause thereof, and to report the result of such investigation to the company. Said Mason was given no authority to settle or compromise or pay plaintiff's claim. On or about January 17, 1907, I was informed by Dr. Mason that he had found it necessary, in order to make proper investigation, to ask plaintiff or her representatives for leave to examine the body of the deceased; that he had made due request for said leave and that said leave had been refused. On or about January 28, 1907, the company received the following letter from plaintiff:

FAYETTE, MISSOURI, *Jan'y* 26, 1907.

The Commercial Accident Ins. Co., Philadelphia, Pa.

GENTLEMEN: I have not yet received the proofs of death blanks from you for which I wrote about the 8th of Jany. Every other company has sent them and they have all been filled out and returned to them and a good many claims already paid. The policy

Number is 16048, and the Assured is Arthur F. Davis. Please send the proofs at once and oblige,

Yours very truly, MRS. MARY B. DAVIS,
Per M. H. D.

On January 28, 1907 I, on behalf of the company, addressed and sent the following letter to the plaintiff herein:

PHILADELPHIA, PA., *Jan. 28th*, 1907.

Mrs. Mary B. Davis, Fayette, Missouri.

DEAR MADAM: We do not see our way clear to give the matter of your husband's death consideration under policy AA16048 until you grant us permission and give us an opportunity to examine the body of the deceased, as required by the contract. We have decided that such examination is necessary in order to properly determine the exact cause of death.

Very truly yours,
HORACE B. MEININGER, *Secretary.*

40 On or about February 3, 1907, the defendant received the following letter from the plaintiff:

FAYETTE, MISSOURI, *Jan'y* 31, 1907.

Commercial Mutual Accident Ins. Co., Philadelphia, Pa.

GENTLEMEN: In reply to your favor of the 28th regarding payment of claim under Policy No. AA16048, will say that if there was any doubt or question whatever about the cause of the death of the assured you might have some ground for wanting an autopsy held now, but since there is none and it is a clear case of accidental death and as there was a Post Mortem held by three of the most reputable doctors here and they were perfectly satisfied that death was due to accidental injury, I think your demands are entirely uncalled for.

The testimony of these doctors in court will surely offset that clause in the policy, and I must ask that you send the necessary proffs of death at once or I shall have the proofs executed and sent you as a matter of record for future use.

Yours very truly, MRS. MARY B. DAVIS,
Per M. H. DAVIS.

On or about February 6, 1907, I, on behalf of the defendant, addressed and sent to the plaintiff the following letter:

PHILADELPHIA, *February 6th*, 1907.

Mrs. Mary B. Davis, Fayette, Mo.

DEAR MADAM: In response to your letter of January 31, 1907 we again renew our request—which you have now twice refused—that the medical officer of the company be permitted to examine the body of A. F. Davis for whose death you make claim. If you again

decline to permit such an examination to be made, this company will reject any claim made under the policy; one of the essential provisions of the policy having been violated.

We shall not submit any claim blanks in this matter until this examination has been allowed.

Will you kindly notify us immediately what you propose to do?

Very truly yours,

HORACE B. MEININGER, *Secretary.*

41 I also on February 6, 1907 addressed and sent to Murray H. Davis, son of plaintiff, the following letter:

PHILADELPHIA, *February* 6, 1907.

Mr. Murray H. Davis, c/o Farmers & Merchants Bank, Fayette, Mo.

DEAR SIR: We are enclosing herewith for your information a copy of a letter this day addressed to your mother, Mrs. Mary B. Davis, regarding the permission to make an examination of the body of your father. It is forwarded simply that you may be informed concerning the matter.

Very truly yours,

HORACE B. MEININGER, *Secretary.*

The company received no reply from plaintiff until on or about February 22, 1907, upon which date defendant received from plaintiff the following letter dated February 20, 1907:

FAYETTE, MISSOURI, *February* 20, 1907.

Commercial Mutual Accident Insurance Co., Philadelphia, Pa.

GENTLEMEN: In reply to your favor of the 6th will say that I am very sorry that you still insist on having some one examine the body of my deceased husband, as I hoped you would be satisfied with the examination of these doctors here as they are physicians of high standing and fully competent to hold such an examination.

However, if you think it is right you may send some one here to examine the body for you. Can't you also send some one authorized who could settle the claim here if your doctor found everything as reported, as most all of the claims have been paid and I am very anxious to have the balance settled as soon as possible.

Then too, if I should want to compromise the claim in lieu of an examination, your agent would have power to settle it without any delay. Please let me know just when you will send some one as I am thinking of going to St. Louis for a few days and would like to be here when he comes, so let me know several days in advance.

Yours very truly, MRS. MARY B. DAVIS.

42 Believing that plaintiff was acting in good faith in her statement made in the last quoted letter that she would permit the defendant or some one on defendant's behalf to examine the body of the deceased, and that she in good faith desired to discuss the matter

of compromise, I addressed and sent a letter to her under date of February 22, 1907, as follows:

PHILADELPHIA, *February* 22, 1907.

Mrs. Mary B. Davis, Fayette, Mo.

DEAR MADAM: Your letter of February 20th has been received. We shall immediately arrange to have our medical representative in Fayette as soon as possible. He will have authority to make an adjustment, should that course be advisable.

Very truly yours,

HORACE B. MEININGER, *Secretary.*

And thereupon I immediately directed said Mason to return to Fayette and gave him as evidence of his authority a letter in words and figures as follows, addressed to the plaintiff:

PHILADELPHIA, *February* 22, 1907.

Mrs. Mary B. Davis, Fayette, Mo.

DEAR MADAM: The bearer, Dr. Frank G. Mason, is fully authorized to act on behalf of this company in relation to a post mortem examination on the body of your late husband, Mr. Arthur F. Davis, and is also authorized to adjust the claim.

Very truly yours,

HORACE B. MEININGER, *Secretary.*

Said authority given as aforesaid to said Mason to compromise plaintiff's claim was given to him by me on behalf of de-
43 fendant solely by reason of the suggestion and request of the plaintiff made in her above quoted letter of February 20, 1907, and said Mason was asked to return to Fayette solely by reason of the invitation expressed in said letter and the assurances therein set forth. Said Mason had no authority whatsoever to settle or compromise plaintiff's claim until such authority was conferred on him by defendant at the request of plaintiff made in her above quoted letter of February 20, 1907. I did not know or have any intimation that said letter was intended merely as a means for luring defendant into sending some person into the State of Missouri with a view to attempting to serve such person with process.

Upon being advised by said Mason that upon his arrival at Fayette, Missouri, the summons in this cause and other papers in connection with this suit had been delivered to him by the sheriff of Howard County, Missouri, I immediately directed him to deliver said papers to J. C. Rosenberger, attorney at law, New York Life Building, Kansas City, Missouri.

I have known said Dr. Frank G. Mason for a number of years. He is a practicing physician and surgeon at Chicago, Illinois, and is in general practice there. He has never had any contract of employment with defendant and is not and never has been employed on any salary by it. He has not and never had had any connection with

this company except that he has made from time to time, when specially requested so to do, medical examinations of persons insured by defendant and reports thereon. Defendant has not had frequent occasion to call upon him for any services. When asked to perform services for us he is and always has been free to accept or decline the engagement as he sees fit. He is and always has been paid in each case for what his services are reasonably worth, each case being treated as a separate and distinct transaction. Said Mason has never paid or *or* adjusted or settled within the State of Missouri any loss on any contract of insurance made by defendant, nor has he ever assisted in so doing.

44

And further affiant saith not.

HORACE B. MEININGER.

Subscribed and sworn to before me, a notary public within and for the County of Philadelphia, State of Pennsylvania, on this the 22nd day of March, 1907.

My commission expires Jan. 15 1909.

[SEAL.] PAUL O. KUSHMANN,
Notary Public.

(Here follows Exhibit A and Exhibit B, marked pp. 45 and 46.)

Class_____ No._____

Application to Membership not binding until accepted by the Secretary.

Application for Membership

TO

The Commercial Mutual Accident Co.

Home Office, Girard Building, Philadelphia.

I hereby apply for Membership in **The Commercial Mutual Accident Co.**, Membership to be based upon the following statement of facts, which are warranted by me to be true and complete.

I also understand and agree that any statement made by me to the Solicitor of this Application, shall not bind the Company unless written hereon; and that this application shall not be binding upon the Company until accepted by the Secretary, and that the Policy shall not be in force until actually issued from the office in Philadelphia.

1. Name in full. Arthur T. Davis

2. Weight. 145 3. Height. 5-10 4. Age. 54 4½. Race. Caucasian

5. My Residence is { Street and Number. / City or Town. Fayette State. Mo

6. Post Office Notices are to be sent to { Street and Number. / City or Town. Fayette State. Mo

7. My place of business is { Street and Number. / City or Town Fayette State. Mo

8. Name of Firm.

8. Name of Firm. /

9. My occupation is Pres of (State kind of goods manufactured, handled or sold.) Bank

10. The duties required of me in that occupation are fully described as follows:

usual to banking business

11. My certificate shall be payable in case of death by accident under provisions of certificate to { Beneficiary's Name in Full. Mary B Davis / Residence. Fayette Mo

12. Give relationship of Beneficiary to you. Wife

13. Have you any other Accident Insurance? If so, name amount and Companies. $5000. in Sedalia New Co

14. Have you ever been a member of this Company? No

15. Has any Accident Insurance Company ever rejected your certificate or declined to renew same? No

16. Have you at any time received or been refused compensation for accidental injury? If so, give particulars. { No

17. Have you ever had paralysis or fits of any kind, or are you subject to, or affected by any bodily or mental infirmity, or have you suffered the loss of a limb, or an eye, or are you lame? No

I hereby agree to accept the Certificate of Membership to be issued on this Application, subject to all of its provisions, conditions and limitations.

Signature of Applicant, A F Davis

Application received and accepted by Secretary,

Aug 5 1896., _____ *o'clock, from which date and hour only Certificate became in force.*

Exhibit A

This application was forwarded by

47 Thereupon the Plaintiff offered in evidence the two depositions of H. S. Massey taken at Fayette, Missouri one on March 4, 1907, the other on the 4th day of April, 1907, both on file in this cause, which said depositions are in words and figures as follows, to-wit:

Depositions of witnesses produced, sworn, and examined on the 4th day of March, A. D. 1907, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at the law office of A. W. Walker, in the City of Fayette, in the County of Howard and State of Missouri, before me, William F. Kirby, a notary public, in a certain cause now pending in the Circuit Court of the County of Howard, in the State of Missouri, wherein Mary B. Davis is plaintiff and the Commercial Mutual Accident Company, a corporation, is defendant, on the part of the plaintiff.

Appearances: A. W. Walker for plaintiff; No appearance for defendant.

H. S. MASSIE, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and saith:

Q. State your residence and occupation.
A. Fayette, Mo.; telegraph operator.
Q. In whose employ?
A. Western Union Telegraph Co. at Fayette, Mo.
Q. State what, if any, telegrams you have in your office or charge between defendant and Frank G. Mason of the 26th or 27th day of February, 1907. If so, please submit such telegrams to the notary.
A. I have the following telegrams in my charge in my office, at Fayette, Missouri, which I here submit to the notary: (Said telegrams being submitted and marked exhibits "A," "B," "C" and "D" and are attached to this deposition and made a part hereof, and offered in evidence.)

H. S. MASSIE.

Subscribed and sworn to before me on the day, at the place, and within the hours aforesaid.

[SEAL.] WILLIAM F. KIRBY,
Notary Public.

My Commission expires Oct. 23, 1907.

48 EXHIBIT "A."

SD MS C 10 Paid

PHILADELPHIA, PENN., 26*th.*

Dr. Frank G. Mason, Fayette, Mo.:

Where will letter reach you wire immediately may send something

HORACE B. MEININGER.

4:30 PM

EXHIBIT "B."

(*Copy Telegram.*)

FAYETTE, Mo., 2/27, 1907.

To Horace B. Meininger, Sec'y Com. Mut. Accident Co., Girard Bldg., Philadelphia, Pa.:

Just arrived. Mail too slow. Wire significance or use long distance. Will await before conferring. Quick.

FRANK G. MASON,
Hotel Howard.

EXHIBIT "C."

(*Copy Telegram.*)

FAYETTE, Mo., *Feb'y* 27, 1907.

To Horace B. Meininger, Sec'y Com. Mut. Accid. Ins. Co., Girard Bldg., Philadelphia, Pa.:

Nothing doing. ruse papers served me. Depositions March fourth. Starting Kansas City see attorney. Midland Hotel.

FRANK G. MASON.

EXHIBIT "D."

SD C 33 Paid x

PHILADELPHIA, PA., 27.

Dr. Frank G. Mason, Fayette, Mo.:

Their proofs refer to post mortem made by three physicians but give no particular. Not at all satisfactory Remember we declined furnish claimblanks try to report some thing today may be
49 away tomorrow

HORACE MININGER.

1:20 P. M.

50 H. S. MASSEY, of lawful age being produced sworn and examined deposes and says:

Direct examination of H. S. MASSEY.

By Mr. SCARRITT:

Q. State your name and business place?
A. H. S. Massey, and I am a telegraph operator.
Q. And you live in Fayette, Missouri?
A. Yes, sir.
Q. Were you such during the months of January and February this year?
A. Yes sir.

Q. Are you still telegraph operator here and were you during that time?

A. Yes sir.

Q. You are the same person whose deposition was taken by Mr. Walker on March 4th, last?

A. Yes, sir.

Q. Now, Mr. Massey, referring to the telegrams which you produced and identified in that depositions, and made them a part of that deposition, and as copied here, I will ask you if these are all the messages that passed between Frank G. Mason and the defendant insurance company in this case; or Horace Meininger, secretary and general manager of that company; on the 26th and 27th of February, last?

A. I went through the files at the time and got all of the messages that I could find there, and I am sure that it *as* all that passed between them.

Q. These messages at Fayette were direct to Dr. Mason?

A. Yes sir.

No cross-examination.

And further this deponent saith naught.

H. S. MASSEY.

Subscribed and sworn to before me this 4th day of April, 1907.

[SEAL.] WILLARD SMITH,
Notary Public.

51 Plaintiff also offered in evidence the depositions taken at Fayette Mo. on April 4th 1907 at the instance of defendant and filed in this court on the 29th day of April, 1907, of the following named witnesses: Mary B. Davis, Murray H. Davis, Dr. Givens, A. W. Walker, W. C. Scarritt, J. C. Rosenberger (taken at Kansas City by plaintiff) including the notice upon which same were taken.

Said depositions are as follows:

52 *Notice to Take Depositions.*

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri, at Kansas City.

MARY B. DAVIS, Plaintiff,
against
COMMERCIAL MUTUAL ACCIDENT COMPANY, Defendant.

To the above named plaintiff or Messrs. Scarritt, Scarritt & Jones, her Attorneys of Record:—

You are hereby notified, that depositions of witnesses to be read in evidence in the above entitled cause on the part of said defendant to be used solely in support of its motion to quash, or set aside the return of service in said cause or of its plea to the jurisdiction of said

court or of the other courts in which said cause has been pending, will be taken at the law office of Mr. Sam C. Major in the town of Fayette in the County of Howard, and the State of Missouri, on Thursday the 4th day of April, 1907, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day; and that the taking of said depositions, if not completed on that day, will be continued from day to day, at the same place and between the same hours until completed, said defendant appearing solely for said purposes and without waiving any of its objections to the return of said service in said cause or to the jurisdiction of said courts.

ROSENBERGER & REED,
Attorneys for Defendant.

Service of the above notice is hereby acknowledged, and issue of dedimus and all exceptions as to time waived, and it is hereby agreed that the depositions may be taken in shorthand then transcribed and signed.

SCARRITT, SCARRITT & JONES,
Attorneys for Plaintiff.

March 28, 1907.

53 Depositions of witnesses, produced, sworn, and examined, on the 4th day of April, 1907, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at the law office of Mr. Sam. C. Major, in the town of Fayette in the County of Howard, and State of Missouri, before me, Williard P. Smith, a Notary Public within and for the County of Howard, in the State of Missouri, in a certain cause now pending in the Circuit Court of the United States in and for the Western Division of the Western District of Missouri at Kansas City, Missouri, wherein Mary B. Davis is plaintiff and the Commercial Mutual Accident Company is defendant, on the part of said defendant.

Appearances.

Mr. Kersey Coates Reed, Esq., appeared as counsel on behalf of the defendant.

Mr. Scarritt, Esq., appeared as counsel on behalf of the plaintiff.

It is agreed by the parties hereto, that these depositions may be taken in shorthand and then transcribed and signed.

By Mr. REED: These are depositions taken on behalf of the defendant pursuant to the annexed notice, the defendant ap-
54 pearing specially, without waiving any of its objections to the jurisdiction of the court, in which said cause is pending, and without waiving any of its objections, to the return of service of process in said cause and for the only purpose of taking evidence to be used solely in support of its motion to quash, or to set aside return of service, or of its plea to the jurisdiction of said court or other courts in which said cause has been pending.

By Mr. SCARRITT: The plaintiff accepted the notice to take depositions pending by defendant, and stipulated as therein requested and had also duly served notice upon the defend- to take depositions in this case, and it is the intention of the plaintiff to take deposition going to the merits of this controversy as well as depositions to be used in the hearing on the pending motion, or in the hearing on the motion or plea that may hereafter be filed in this case, and declines to recognize any special appearance on behalf of the defendant, and especially declines to recognize any special appearance on behalf of the defendant in the taking of any depositions under the plaintiff's notice to take depositions.

By Mr. REED: I desire to make this further statement:—The witnesses produced here by the defendant are produced in pursuance to the notice and stipulation hereto annexed and at this time no
55 depositions are being taken on behalf of the plaintiff and the defendant is not appearing at the taking of such depositions taken on behalf of the plaintiff; and when witnesses are produced on behalf of the plaintiff and the plaintiff begins the taking of her depositions, the defendant will decline to appear at the taking of such depositions.

MRS. MARY B. DAVIS, the plaintiff, of lawful age being produced, sworn and examined on the part of the defendant, deposes and says:

Direct examination of MRS. MARY B. DAVIS.

By Mr. REED:

—. State your name.
A. Mary B. Davis.
Q. Where do you live?
A. In Fayette, Missouri.
Q. What county?
A. Howard County.
Q. Are you the plaintiff in this action?
A. I certainly am.
Q. This suit is for the purpose of recovering on an accident indemnity from the defendant on account of the death of your husband?
A. Yes sir.
Q. Do you remember seeing a gentleman by the name of Mason? Dr. Frank Mason—in Fayette, about the 14th or 15th of January, 1907?
56 A. Yes sir.
Q. Did he request that the defendant in this case be allowed to make an autopsy on the body of your deceased husband at that time?
A. Yes sir.
Q. And you declined to allow it, didn't you?
A. I told him that I didn't think that it was necessary.
Q. That was about the fourteenth or about the fifteenth of January, 1907?

A. I think it was about the 14th of January.

Q. After that statement made by you, he then departed, didn't he?

A. Not until the next day.

Q. Was that because your—because of your conversation with him?

A. Yes sir.

Q. Now I will ask you whether or not shortly after the 6th day of February, 1907, you received a letter from the defendant?

A. I did

Q. Have you th-t letter with you?

A. No sir.

Q. Do you know where that letter is?

A. I do.

Q. Where is it?

A. I think that my lawyer has it.

Said letter was produced by counsel for plaintiff and it was admitted by the parties hereto that the same was written on behalf
57 of the defendant company by Horace B. Meininger, secretary of defendant company to the plaintiff herein.

Said letter was marked by the stenographer "Exhibit A".

Said letter, marked -y the stenographer "Exhibit A" was introduced in evidence by the defendant, a copy of which said exhibit is hereto attached, marked "Exhibit A".

By Mr. REED:

Q. You received that letter shortly after February 6th, 1907?

A. I did.

Q. Had you had any correspondence with the company prior to that date?

A. No sir.

Q. Had any one in your behalf had any correspondence with the defendant company?

A. Up to that date?

A. To February 6th?

A. No sir, my son has a power of attorney to attend to my business for me.

Q. I will ask you whether or not you had correspondenc*t* with the defendant company prior to February 6th, 1907?

Q. I did not.

Q. Did you receive any letters from the defendant company prior to that date?

A. My son had power of attorn-y to attend to my business for me.

58 Q. Was he looking after this matter for you?

A. He was.

Q. Who is your son?

A. Murray H. Davis.

Q. Do you know what letters he had written to the company in your behalf prior to February 6th, 1907?

A. I suppose I do.

Q. He did write some letters to the company with relation to this matter prior to February 6th, 1907, did he?
A. Yes sir.
Q. You had given him full authority to write you in this matter?
A. I did.
Q. When you received that letter February 6th, 1907 from the company, what did you do with it?
A. Referred it to my lawyer.
Q. You had consulted the lawyer prior to this time, hadn't you?
A. I have had a lawyer fro sometime.
Q. Was this the first letter with reference to this matter that you had referred to your lawyer?
A. Yes sir.
Q. Who was your attorney,—the one that you referred this to?
A. W. C. Scarritt.
Q. Had you talked with the lawyer with reference to this case prior to this date?
A. No sir.
Q. What did you —at whqt time was it that you saw Mr. Scarritt?
59 A. The 27th of February.
Q. Was that the first time you saw him with reference to this claim?
A. It was.
Q. Had you corresponded with him about it prior to that date?
A. I wrote.
Q. What date did you write to him first?
A. You will have to refer that to my lawyer—I don't remember.
Q. How soon after you received this letter, did you write to Mr. Scarritt?
A. It must have been ten days.
Q. Ten days after you received that letter you wrote to Mr. Scarritt?
A. Yes sir.
Q. Did you consult any lawyer at Fayette?
A. I did not.
Q. Did you tell Mr. Scarritt that you had refused to allow an autopsy to be made?

To which question counsel for plaintiff objected.
Witness refused to answer the said question on the advice of her attorney.

By Mr. REED:

Q. You had up to this date refused to allow an autopsy upon your husband's body?

To which question counsel for plaintiff objected for the reason that the same is leading; because the witness has already told
60 counsel that she thought an autopsy was not necessary.

By Mr. REED:

Q. So you wrote to Mr. Scarritt about the 16th or 17th of February, 1907, about the 16th?
A. I don't remember—it was about that time though.
Q. I will ask you if this letter is signed by you, Mrs. Davis.

(Counsel hands witness letter.)

By the WITNESS:

A. It is.
Q. Did you send that letter to the company?
A. I did.

Counsel for defendant then introduced in evidence said letter—dated February 20, 1907.

Which said letter was marked by the stenographer "Exhibit B," a copy of which is hereto attached and marked "Exhibit B."

By Mr. REED:

Q. Where did you first see that letter?
Q. Which one?
A. The one that I just hand you?
A. I didn't see it—the one with my name to it?
Q. Yes—when did you first see that letter?
A. When it was sent.
Q. About February 20th, 1907?
A. Whenever the date was.
Q. Did you write that letter yourself?
A. My—I am responsible for that letter.
61 Q. Did you write it yourself?
A. No sir.
Q. You merely signed it?
A. Yes sir.
Q. Where did you sign it?
A. At my home.
Q. Was it read to you?
A. It was dictated at my request.

Counsel for plaintiff moves to strike out that answer as not being responsive to the question.

By Mr. REED:

Q. I will ask you whether or not that letter was brought to you prepared for your signature?
A. That letter was signed of my own free will and accord.

Counsel for plaintiff moves to strike out the last answer as not being responsive to the question.

By Mr. REED:

prepared*

Q. It was brought to your house preparatory for your signature?
A. Yes sir.
Q, That was the first time that you knew of the contents of that letter—when it was brought to your house?
A. Yes sir.
Q. Who dictated that letter?
A. My son.
Q. You didn't dictate it yourself?
62 A. No sir, I didn't.
Q. Had you been consulted with relation to that letter before it was brought to you?
A. No sir.
Q. No one had spoken to you about it before it was brought to you for your signature?
A. No sir.

go*

Q. Did you make a—did you give—go to St. Louis at any time after the 20th of February?
A. No sir.
Q. Did you make a trip to St. Louis after the 20th day of Febraury?
A. No sir.
Q. Did you have any intention of making a trip there to St. Louis?
A. Yes sir.
Q. When did you expect to go?
A; It was business of my own, and I object to it.

By Mr. SCARRITT: Answer the question.

A. I would have gone at that time——
Q. (Interrupting.) You would have gone at what time, do you mean?
A. At the time I said; I would have gone but for the illness of my mother.
Q. When was you expecting to leave for St. Louis?

Counsel for plaintiff here objects to the question for the reason that it is irrelevant.

Mr. SCARRITT to the witness: You need not answer the question.
63 By the WITNESS: I refuse to answer the question.
By Mr. SCARRITT: This is immaterial to the issues in this case—you cannot bring a witness here and then impeach her.
By Mr. REED: I ask to have the Notary rule on the question. (To the witness:) When did it first become apparent that you were not going to St. Louis?

---

*In pencil in copy.

A. When my mother was down ill.
Q. When was that?
A. About the first of February.
Q. About the first of February—did she continue ill from the first of February?
A. She is ill now—confined to her room.
Q. When was it you was expecting to go to St. Louis, prior to the first of February?

To which question counsel for plaintiff objected.

Q. The reason you didn't go was on account of the illness of your mother—is that correct?
A. I told you it was.
Q. Did you read this letter before you sent it?
A. I usually do.
Q. Did you read this one?
A. I did.
Q. Who requested you to sign it?
A. No one.
Q. Who brought it to you?
64 A. My son brought it to me at my request,
Q. Had your son prepared the letter?
A. He did.
Q. What had induced you to change your mind as to allowing an autopsy on the body of your husband?

To which question counsel for plaintiff objected.

By the WITNESS:

A. Three months ago to-day I changed it——
Q. (Interrupting.) I mean a post mortem at the instance of this insurance company?
A. I don't think that it was necessary.
Q. Rather you had never changed your mind as to allowing an autopsy by this insurance company?
A. I didn't think that it was necessary.
Q. Is that correct?
A. It is.
Q. At no time were you consenting to allow this insurance company to have an autopsy on the body of your husband were you?

To which question counsel for plaintiff objected for the reason that the same is leading. The witness has not said that she refuses, and the correspondence shows that she did not refuse.

By Mr. REED:

Q. At the time you wrote this letter, February 20th, you didn't change your mind with reference to this autopsy?
A. I think I said "If you think it is right."
65 Q. You didn't change your mind on the subject?
A. No sir I didn't.

Q. After you wrote to Mr. Scarritt did you receive any advice from Mr. Scarritt?
A. Do people usually from a lawyer?
Q. If you will just kindly answer the question?
A. Yes sir.
Q. Was that before or after you received this letter?

To which question counsel for plaintiff objected.

By the WITNESS:

A. I told you my son had power of attorney to attend to my business and he did it.
Q. Was Mr. Scarritt corresponding with your son instead of yourself?
A. Yes sir.
Q. Was—so you received an answer direct from Mr. Scarritt?
A. No sir.
Q. Now, on the day that—on February 27, 1907, Mr. Mason called at your house, didn't he?
A. He did in the afternoon at about half past one, I think.
Q. And he demanded an autopsy at that time, didn't he?
A. Yes sir.
Q. And you refused to see him?
A. Yes sir.
66 By Mr. SCARRITT: Did you see him at all?
A. No sir.
By Mr. SCARRITT: Any communication you had with him was in writing
A. Yes sir.
By Mr. SCARRITT: We move to strike out the last answer "yes sir" because it calls for secondary evidence.

By Mr. REED:

Q. You are, you were informed that he was at the door and wanted to see you?
A. He sent me his demand.
Q. And you refused to see him?
A. Told him that I was sick, sent word that I was sick.
Q. Is this the communication that you received at that time (handing witness paper)?
A. Yes sir.

Which said letter (dated Fayette Feb'y 27, 1907, and signed by Frank G. Mason M. D. [illegible]ng for Com. Mut. Accident Ins. Co., and addressed to Mrs. Mary Davis, Fayette, Mo.) was introduced in evidence by counsel for defendant.
Said letter was marked by the stenographer, "Exhibit C", and a copy of the same, marked "Exhibit C", is hereto attached.

By Mr. REED:

Q. When did you first talk about suing this company?
67 A. When I put it in the hands of the lawyer.

Q. When you first wrote to Mr. Scarritt you discussed the matter of bringing suit?

A. I consulted him and asked him to come down here.

Q. That was after February 6th, wasn't it?

A. 27th of February, when he came down here at my request. I had never said anything about bringing suit but merely consulted him.

Q. You had never said anything to him about bringing suit?

A. (No answer).

Q. You didn't see the correspondence that passed between him and your son?

A. I did.

Q. At whose request was it that this letter of February 20th, was written to come, he only asked them to send a man down here to make an autopsy?

To which question counsel for plaintiff objected for the reason that the same is irrelevant and immaterial.

By the WITNESS: (Witness refuses to answer on the advice of her attorney).

By Mr. REED:

Q. Was that at the suggestion of your son or Mr. Scarritt, which one?

To which question counsel for plaintiff objected for the same reason.

68 (Witness again refuses to answer the question on the advice of her attorney.)

By Mr. REED:

Q. I would like to have the witness to answer that question.

Mr. REED to the witness: Do you refuse to answer that question?
By Mr. SCARRIT: She did.

By Mr. REED:

Q. When was the first time that you say you talked about having suit filed against this defendant company here?

A. 27th February.

Q. What time of day?

A. Between eleven and twelve o'clock.

Q. That was the first you knew of suit—that suit was being contemplated against this defendant insurance company here?

A. Yes sir.

Q. Who did you see about it at that time?

A. I saw my lawyer.

Q. Mr. Scarritt?

A. I did.

Q. Or Mr. Walker?

A. Mr. Scarritt is my lawyer.

Q. Or what——

By Mr. REED: The defendant intends to file an amended motion to quash the return of service in this case, copy of which
69 is hereto attached, marked "Exhibit D," and these questions are relevant and competent and material in support of the allegations of this amended motion; and likewise competent and material under the original motion, the grounds of which are more specifically alleged in the amended motion.

By Mr. REED:

Q. At whose suggestion was that letter of February 20, written to the defendant in this case?

To which question counsel for plaintiff objects for the reason that the same is irrelevant and immaterial, and has been asked before.

By Mr. REED (To the Notary:) I would like to have the witness answer the question.

By Mr. SCARRITT: We object; she says that her son brought the letter and she signed it, and it is her letter.

By Mr. REED:

Q. At whose suggestion was it done?

By Mr. SCARRITT: We object, there is no charge of conspiracy in this case.

By Mr. REED: I am trying to show that this man was brought here for the purpose of serving him.

By Mr. SCARRITT: We object, the correspondence was in writing, and they speak for themselves.

(Witness declines to answer the question on the advice of her attorney:

70 By Mr. REED: I think the witness should be compelled to answer the question.

(The Notary then stated that he would not compel the witness to answer the question).

And thereupon, counsel for defendant then and there at the time excepted to the ruling of the Notary and saved his exceptions.

By Mr. REED:

Q. When Dr. Mason came up there to your house in the afternoon what if anything transpired to make you refuse to see him, and to refuse to allow an autopsy to be made on the body of your deceased husband,—had anything taken place?

To which counsel for plaintiff objected for the reason that the same is mere argument; she said that she was sick, and didn't want to see him.

By Mr. REED:

Q. Was that the reason you refused to allow an autopsy to be made because you were sick?

To which question counsel for plaintiff objected for the reason that the same is leading and argumentative.

By Mr. REED:

Q. There was no autopsy made on the 27th or 28th of February, 1907, was there, on the dead body of your husband?

A. No sir, not that I know of.

71 Q. You knew that Doctor Mason wanted to make an autopsy, did you not?

To which question counsel for plaintiff objected for the reason that the same is immaterial—interview with Dr. Mason, is that he didn't want to make an autopsy.

And further this witness saith naught.

MARY B. DAVIS.

Subscribed and sworn to before me this 4th day of April, 1907.

WILLARD SMITH,

[SEAL.] *Notary Public.*

MURRAY H. DAVIS, of lawful age, being produced sworn and examined on the part of the defendant, deposes and says:

Direct examination of MURRAY H. DAVIS.

By Mr. REED:

Q. Where do you live?

A. In Fayette.

—. Where?

A. Fayette, Missouri.

Q. What is your occupation?

A. I am cashier of the Farmers and Merchants Bank.

Q. What relation are you to the plaintiff in this suit?

A. I am her son.

Q. Have you seen the letter of February 20th, introduced in evidence here, in the testimony of your mother, Mrs. Davis?

A. I don't know that I saw it.

Q. I will show it to you.

72 (Counsel hands witness letter.)

By the WITNESS:

A. Yes sir.

Q. Did you do—did you write that letter?

A. Yes sir.

Q. Did you send it to the defendant about the day that it was written?

A. Yes sir, the same day.

Q. Did you receive a telegram from Dr. Mason shortly after that asking when it would be agreeable for him to come to Fayette?

A. My mother received a telegram.

Q. Did you send the telegram in reply to that?

A. It was received.

Q. This is it? (Showing witness.)

A. Yes sir.

Counsel then reads letter as follows:—

CHICAGO, ILLINOIS, 25, '07.

Mrs. Mary P. Davis, Fayette, Mo.:

If agreeable see you tomorrow morning. Answer.

FRANK G. MASON.

By Mr. REED:

Q. Did you reply to Dr. Mason?
A. Yes sir.
Q. Do you remember the contents of the telegram you sent him?
A. Yes sir.
Q. Is that it (shows to witness).
A. Yes sir.

73 Counsel then reads said telegram as follows—

FAYETTE, MISSOURI, *February* 25, 1907.

Dr. F. G. Mason, 29 State St., Chicago, Illinois:

Come Wednesday morning.

M. H. DAVIS.

By Mr. REED:

Q. From February 6, 1907 to February 20, 1907, what action did you take with reference to this claim against defendant company?

To which question counsel for plaintiff objects for the reason that the same is too general.

Q. Did you do anything from February 6, to February 20 with reference to this claim?
A. I had some correspondence with the attorney.
Q. Who was that attorney?
A. Mr. Scarritt.
Q. When did you talk about bringing suit against the defendant company?
A. With whom.
Q. Mr. Scarritt.
A. I wrote to him about the company demanding this autopsy.

Counsel for plaintiff here objected and moved that the answer be stricken out, for the reason that it -alls for a confidential communication.

By Mr. REED:

Q. When did you first think about bringing suit against the defendant company?

74 A. I always thought that I would have to bring a suit; Dr. Mason said that the company was a small company and some other statements derogatory to it.

Q. You thought from the first that it would be necessary to sue the company, did you?
A. Yes sir.

Q. When was the first correspondence you had wit- your attorney Mr. Scarritt?

A. I don't remember. I think it was along in about the first of February.

—. About when?

A. About the first of February.

Q. Did you see Dr. Mason on his first visit here, February 14 1907?

A. Yes sir.

—. Where did you see him?

A. At the bank first.

Q. Did he request an autopsy at that time?

A. He did.

Q. And no one was had?

A. No sir.

Q. What was done after Mrs. Davis received that telegram from Dr. Mason February 25th?

A. I wired him to come.

Q. What else did you do, correspond with Dr. Scarritt about the matter?

A. Some, yes.

Q. Did you tell him when Dr. Mason should come to Fayette?

A. Told him when I would be here.

75 Q. What was your purpose in telling him that?

To which question counsel for plaintiff objects.

By Mr. REED:

Q. Why did you ask Dr. Mason to come Wednesday instead of Tuesday, the day he suggested?

A. Because I wanted him then.

Q. What was the reason for that?

Counsel for plaintiff objects to this question for the reason that the same is immaterial and irrelevant.

Witness declines to answer on advice of counsel.

Q. What was the reason in postponing the date of his visit?

Counsel for plaintiff objects to this question for the reason that the same is irrelevant and immaterial.

By Mr. REED:

Q. When did Mr. Scarritt arrive in Fayette?

A. February 27th.

Q. In the morning or the night before?

A. In the morning, the same train that Dr. Mason came in on.

Q. Did you consult with the attorney in Fayette about the matter before that?

A. No sir.

Q. When Dr. Mason came to town what did you do, what were the first words that passed between you and Dr. Mason on the 27th day of February?

A. The first words, he called me up at the hotel. He asked me when I was ready to hold an examination.

76 Q. When did you see him next?

A. At the hotel; never saw him until I saw him at the hotel.

—. When did you see him at the hotel?

A. In the——

Q. (Interrupting.) Who accomp-ied you?

A. Dr. Given and Mr. Scarritt.

Q. What time of the day was that?

A. I think about ten o'clock.

Q. Had Mrs. Davis authorized you to bring suit against the defendant company prior to this time?

A. I was attending to all of the insurance company's matter and did as I thought was best.

Q. Did she know you were bringing suit?

A. She didn't know anything about it. I had power to settle up the ins-rance business and I was doing what I thought was best for her interests.

Q. When did you decide to file the suit?

A. After the interview with Dr. Mason on the 27th day of January.

Q. Not till after the interview with Dr. Mason?

A. Not till after I saw him that morning.

Q. At the hotel?

A. Yes sir.

Q. What did you do after you saw him?

A. I didn't do anything.

Q. And he requested that an autopsy be allowed?

A. He did.

Q. Didn't he at the hotel that morning?

77 A. No sir.

Q. What was said about the autopsy?

A. I asked him if he was ready to hold the autopsy; asked him if he was ready to hold the examination, and he said well, I am waiting for a communication from the company; a telegram.

Q. Then what was said?

A. I then asked him if he was here as an agent of the company with authority to settle this claim and he said that he was.

Q. Why did you ask him that?

A. I wanted to know if we were dealing with some one that had the power to settle it.

Q. He came here to make an autopsy?

A. He came here to settle the claim or to hold an autopsy.

Q. Did you make an offer of compromise?

A. No sir, he made us one.

Q. Did you request an offer from him?

A. Asked him; asked if he would rather compromise it or hold an examination and he said he could compromise it and asked him what he was willing to pay?

Q. And he said that he was waiting for advice from Philadelphia?

A. Yes sir; I asked him what he was willing to pay and he said twenty five hundred dollars.
Q. What did you say then?
A. I refused it.
Q. Then what was done?
78 A. I think my attorney took up the conversation.
Q. What did he say?
A. He said that he didn't think that was a fair settlement.
Q. Did he ask you whether or not it was your desire to have an autopsy made at that time?

To which question counsel for plaintiff objectes.

Q. I will ask you whether it was a fact that you desired to have an autopsy made at this time?

To which cou-sel for plaintiff objects.
The notary sustains the objection.

By Mr. REED: We contend that the offer was not made in good faith; the question was whether the defendant can be properly sued in this state; it was an effort to get an agent, or one called an agent, into this state, who they could serve with process.
By Mr. SCARRITT: I will ask you whether Frank B. Mason was the agent of the defendant company?
By Mr. REED: I don't know, I don't know anything about it.

By Mr. REED:

Q. I will ask whether or not it is not a fact when you wrote that letter to the company, that you had no intention of having an autopsy made by him?
A. I didn't say anything about an autopsy.
79 Q. However this letter says, however if you think it is right you may send an examiner here to examine the body for you,—what did you mean by that?

To which question counsel for plaintiff objected because the language speaks for itself.

By Mr. REED:

Q. You knew that letter referred to an examination of the body, the letter of February 20th?
A. Examination, yes sir.
Q. By examination you didn't mean autopsy?
A. No sir.
Q. It was not your intention to have an autopsy made, was it?

To which counsel for plaintiff objected for the reason that the same is immaterial and irrevelant.

Mr. SCARRITT to the witness: Don't answer the question.

By Mr. REED:

Q. Do you refuse to answer the question?
By Mr. SCARRITT: He does.

By Mr. REED:

Q. It was your—I will ask you if it was your purpose in—I will ask you what was your purpose in inserting this sentence in that letter of February 20th?

(No answer.)

Q. What was your purpose?

A. You have the letter there

80 Q. I will ask you whether or not it is a fact that your purpose in inserting that, was in order to get an examiner representing the defendant company, to come into this state, so that you could get service on it?

To which question, counsel for plaintiff objects because the letter speaks for itself.

By Mr. REED:

Q. I am asking you to answer that question,—is it not a fact that your purpose was—wasn't that your purpose that the time you wrote the letter?

A. You have the letter there.

Q. Answer the question?

A. I we decided not to hold an examination, I wanted an examiner here that could settle it.

Q. If you decided not to allow an autopsy?

A. If we didn't decide to allow an autopsy made I wanted an agent here who had authority to settle the claim; I wanted to get through with it.

Q. Now, where did you get the contents of that letter?

A. Out of my head.

Q. Did you write that yourself or was it written from the suggestions of some one else?

A. I wrote it myself.

Q. Did anyone else tell you what to say?

A. No sir.

Q. Or suggest to you what to say?

A. No sir.

Q. When was that suit filed, this suit?

81 A. 27th of February.

Q. What time of the day?

A. I think it was about—11:30; 10:30.

Q. What time of the day did Mr. Scarritt leave Fayette, that day?

A. About eleven o'clock.

Q. When did you first instruct him to file the suit or prepare the papers for suit?

A. I didn't see any papers at all.

Q. Did you know that he was contemplating bringing suit or otherwise?

A. He was looking after the case for me. And he was attending to the legal part of it.

Q. When were these papers drawn up?

A. I don't know, I didn't see them.

Q. After Mr., Dr. Mason, told you that he could not pay 90 % of the claim, what was done then?

A. Mr. Scarritt told him to come ahead that he was ready to hold the examination.

Q. What was said then?

A. He didn't say anything.

Q. What was done then?

A. Mr. Scarritt said, after a few minutes, "I take this to be a refusal to hold this examination."

Q. Isn't it a fact that Dr. Mason said that he would have to wait a little while?

A. No sir.

Q. That he would be able to hold it in the morning?

82 A. No sir.

Q. Didn't Mr. Scarritt tell him that he would have to hold it right away or not at all?

A. He said he was ready to hold the examination right away.

Q. By examination you didn't mean autopsy, did you?

To which counsel for plaintiff objected for the reason.

By Mr. REED:

Q. You didn't tell him that you were ready to hold the autopsy?

A. Told him that we were ready to hold it.

Q. But you were not ready to hold an autopsy, you didn't tell him that you were ready to *to* hold an autopsy, did you?

A. I told you.

Q. You didn't use the word "autopsy"?

A. No sir.

Q. Who else was at the hotel when this conversation took place.

A. Dr. Given.

Q. When were the papers served on Dr. Mason?

A. I should say about half past ten or eleven.

Q. Were you present when they were servee?

A. Yes sir.

Q. Was that before Mr. Scarritt went away?

A. Yes sir.

Q. Who served the papers?

A. Deputy Sheriff.

Q. They were served on Dr. Mason while you were *were*

83 all there, at this same interview?

A. Yes sir.

Q. How soon after Dr. Mason told you he could not pay ninety per cent. of the claim, were those papers served on him?

A. After he refused to hold the examination, then the papers were served.

Q. Where was the deputy sheriff all this time, during this interview?

(No answer.)

Q. Do you know where he was?

A. This interview lasted a good while.

Q. How long?

A. Nearly one hour.
Q. You saw the deputy sheriff before you went over there, didn't you?
A. I didn't, no sir.
Q. Where did he come from when you saw him?
A. I don't know.
Q. No adjustment of this claim was made?
A. No sir.
Q. You wanted Dr. Mason to come and make that examination at that time, did you?
A. Yes sir.
Q. That, right away?
A. Yes sir.
Q. Where was the examination to be held?

To which counsel for plaintiff objected for the reason that it asks for a mere conclusion.

By Mr. REED:

84 Q. Had you made any arrangement for holding that examination?
A. No sir.
Q. Or anyone at your suggestion or direction?
A. No sir.
Q. Where was the body?
A. In the grave.
Q. Isn't it a fact, that Dr. Mason said that he would hold the examination, that autopsy, the next day?
A. No sir.
Q. That is not a fact?
A. No sir.
Q. Had you made any arrangement to have the body disinterred?
A. No sir.
Q. How did you expect to be able to have the examination held then?

To which counsel for plaintiff objected for the reason that it is immaterial and irrelevant.

By Mr. REED:

Q. What did Dr. Mason say when you said that you were ready to have the examination held?
A. Nothing at all.
Q. Did you suggest that he make an offer of compromise before or after you said you were willing to have the examination made?
A. Before.
Q. You asked him for an offer of compromise before you were ready for the examination?
85 A. Yes sir.
Q. After you found that he would not make an offer agreeable to you, you told him you were ready to have the examination made?
A. Yes sir.

Q. What did he say?
A. Nothing.
Q. Then you had the papers served on him?
A. Mr. Scarritt asked him, "I take it you refuse to hold this examination, and he waited for his reply and made no reply.
Q. How long did he wait?
A. Several minutes.
Q. Then what was done?
A. The papers were served.
Q. The deputy sheriff was called out of the next room, wasn't he?
A. The deputy sheriff was sent for.
Q. How did Dr. Given happen to be present?
A. He was a friend of mine, and I took him over with me to the hotel.
Q. At whose suggestion did you take him over there to the hotel?
A. Dr. Given had several conversations with Dr. Mason and I wanted him to be present that morning.
Q. He was, who asked the deputy sheriff to be over there,—did you do that?
A. No sir.
Q. Had you employed Mr. Walker to represent you in this case prior to that time?
86 A. No sir, Mr. Scarritt was my attorney.

Cross examination of MURRAY B. DAVIS.

By Mr. SCARRITT:

Q. You say that these negotiations were, these negotiations with Dr. Frank B. Mason, on February 27th, extended over about one hour?
A. I judge they last three quarters or one hour. I think it was about ten o'clock when we went over there and pretty near eleven when we got through.
Q. Do you know what time that he arrived in the city that morning?
A. I think on the 6:30 train.
Q. How long did he stay in the city?
A. I think he left on that afternoon train, that leaves here at 3:45.
Q. Do you know where he went from here?
A. He said that he was going to Kansas City.
Q. During these negotiations did he state whether or not he had authority to compromise and settle this claim in dispute?

To which counsel for defendant objects for the reason that it is incompeten- and irrelevant and immaterial, and hearsay.

By Mr. SCARRITT:

Q. Did he?
A. Yes sir.
Q. What did he say about it?

Counsel for defendant objects for same reason.

A. He said he had full authority to settle.

87 Q. Did he say anything about his authority to make an actual payment?

A. Yes sir, he said that he could write a draft for the payment of the money.

To which counsel for defendant objected for the same reason heretofore given.

By Mr. SCARRITT:

Q. Did he say that he was fully authorized to do that by the company?

To which question counsel for defendant objects.

A. Yes sir.

Q. In that connection did he ask, did you ask if he had any written authority to that fact?

A. Yes sir. He said that he had it in writing.

Q. What did he do then?

A. Produced the letter from the company saying that he had full authority to act.

To which counsel for defendant objects.

By Mr. SCARRITT:

Q. Look at this letter and envelope (handing witness letter and envelope) and say whether or not that was what he drew out of his pocket?

A. Yes sir.

Q. What did he do with it?

A. Turned it over to me and said that I could keep it.

Q. In that connection did he make you any offer to settle this claim?

To which counsel for defendant objects for the reason that same is irrelevant and immaterial.

88 A. Yes sir.

Q. What was the offer?

A. $2500.

Q. Did he offer to pay you $2500?

A. Yes sir.

Plaintiff then offered in evidence letter marked, "Exhibit F" a copy of which is hereto attached and marked "Exhibit F."

Q. Had you received any communication through the mail from the company previous to this, a short time previous to this time?

A. Yes sir, my mother did.

Q. Is this the letter which I now hand you received by your mother and hand- to you by her?

A. Yes sir.

Q. That was from the company.

A. Yes sir.

Counsel for plaintiff then offered in evidence "Exhibit G, a copy of which is hereto attached and marked exhibit G.

—. I hand you exhibit H and ask you if that was received from the defendant company?

A. Yes.

Q. About the time it usually takes in due course of mail after its date here?

A. Yes sir.

Counsel for plaintiff then offered in evidence "Exhibit H", a copy of which is hereto attached and marked exhibit H.

89 Q. State at that last interview if Frank B. Mason said that he was authorized to make an examination of the body if it was deemed necessary?

A. Yes sir.

Q. You have stated to Mr. Reed's question, that he was given the opportunity to make the examination, and that it was in your presence and with your authority?

To which counsel for defendant objects for the reason it is incompetent irrelevant and immaterial.

A. Yes sir.

Q. State whether this Mr. Mason went to the court house and got a copy of the pleadings and records pleadings in this case, immediately after the suit was brought and took them to Kansas City with him?

To which question counsel for defendant objects because it is irrelevant and immaterial and hearsay.

—. Mr. Mason told me that he was going to Kansas City to employ an attorney; that he was not an attorney but a doctor.

Counsel for defendant objects, and moves to strike out the answer of witness.

Q. He had been in this state prior to that time with reference to this claim, had he not?

A. Yes sir, in January, January 14th or 15th.

Q. Just after your father's death, did you notify the defendant company of his death by accidental gun shot wound?

90 A. Yes sir.

Counsel for defendant objects because question assumes that he died from an accidental gun shot wound, and move to strike same out.

Q. Did you send proof of death to the defendant company in this suit?

A. A Yes sir.

Q. How were they sent?

A. By registered mail.

Q. Look at the card I now hand you, and state whether or not that is the registered P. O. receipt for the proof of loss under this claim?

A. Yes sir.
Q. Was that received by you in due course of mail?
A. Yes sir.
Q. Was the company—what was the first you heard from the company after sending the proofs?
A. The next thing I heard, was Dr. Mason's visit.
Q. When was that?
A. 27th of February.
Q. The first visit?
A. 14th of January.
Q. Did you see him on that day?
A. Yes sir.
Q. Was that the same Dr. Mason who afterwards came on the 27th of February?
A. Yes sir.
91 Q. At that time how long did he stay?
A. Until the 15th.
Q. Did you have a number of interviews with him?
A. Yes sir.
Q. State whether or not, during that visit he suggested settling these claims?

Counsel for defendant objects to this as being incompetent, irrelevant and immaterial.

A. Yes sir.
Q. Did you have a number of interviews with him during those two days?
A. Yes sir I think I had two, and maybe more.
Q. Did you take him to your mother's home?
A. Yes sir.
Q. Did you have an interview with here there?
A. Yes sir.
Q. Did you take him to see *in of* the doctors who held the post mortem examination over your father's body?
A. Yes sir.
Q. Was Frank B. Mason pres-nt?
A. Yes sir.
Q. Did he suggest any compromise during these interviews?

(No answer).

Q. I am not referring to while in the presence of the doctors, but in his interviews with you?
A. After I had the interview with the doctors he said
92 that he would rather compromise it than hold an autopsy because it was not a very — test.

Objected to by counsel for defendant, and said counsel moved that the same be stricken out.

Q. What representations did he make with reference to being authorized to represent the defendant company?

Objected to by counsel for defendant as being incompetent, irrelevant and immaterial.

A. He said that he was sent here by the company to hold an autopsy.
Q. Did you show him any courtesies during that visit of his?
A. Yes sir.
Q. Did you arrange any interview between him and the doctors?
A. Yes sir.
Q. Also arrange an interview between him and your mother?
A. Yes sir.
Q. He staid here a couple of days?
A. Yes sir.
Q. Did you and him complete any settlement at that time?
A. *A* No sir, he said that he would like to compromise it and I said I would go to court first.
Q. Tell him that you though- you had a just claim—did you tell him that?

Objected to by defendant.

93 A. Yes sir.
Q. After that did he still try to get you to compromise it?
A. Yes sir.
Q. During that first time that he was here represented himself here by authority of the defendant company?
A. Yes sir, he said that he was representing them.

Objected to by counsel for defendant and moved that same be stricken out.

Q. Did you communicate with him?
A. He said that he could compromise the claim, and I thought that he had full authority to act.
Q. During these negotiations that occurred on the 27th of February last, you said that it was by Dr. Given and Dr. —— Was the general liability of the company and its solvency discussed by them?
A. Yes sir.
Q. State whether or not among other things, he urged the question of the financial condition of the company as an argument to induce a compromise on the latter basis?
Z. Yes sir, he spoke unfavorably of the company.
Q. Of its financial condition?
A. Yes sir.
Q. Also of its methods of transacting business?
A. Yes sir.
Q. What did he say about their methods as to whether you would have to enter suit?

Objected to — defendant.

94 A. He said that it was a small company and he didn't know whether they could pay the full amount or not.
Q. Did he make this argument in arguing for the lower basis of settlement?
A. Yes sir.
Q. He said that the company was not authorized to do business

in the state of Missouri and if you brought suit you would have to go to another state?

Objected to by defendant.

A. Yes sir.

Q. He said positively that the company was not authorized to do business in Missouri?

A. Yes sir.

Q. At the same time he was trying to settle the claim, was he?

A. ——

Objected to by defendant, and counsel for defendant moves to strike same out.

A. Yes sir.

Redirect examination of MURRAY H. DAVIS.

By Mr. REED:

Q. You say on that first visit, Dr. Mason suggested a compromise?

A. Yes sir.

Q. What did he say?

A. He said that to hold an autopsy would be very disagreeable and he would rather compromise the claim.

Q. He would or the company would?

A. He said that he would rather compromise the claim.

95 Q. Did he suggest any figures?

A. No sir.

Q. Did you?

A. I said that I would not compromise it.

Q. And that was all that was said about it?

A. (No answer.)

Q. You don't know whether or not he had any authority to make a compromise on that first visit or not?

A. He said he could.

Q. In that letter of February 20th, why did you ask him to send an examiner here who had the authority?

A. I don't know that they had p—— I didn't know that they had sent Dr. Mason.

Q. All that makes you think he had authority to compromise the claim on the 14th of January,

A. He said he could compromise it.

Q. That was all that was said about it?

A. (No answer.)

Q. February 27th, when, after you were through with the interview at the hotel, Dr. Mason went to your mother's house?

A. In the afternoon.

Q. And he said that he wanted to have an autopsy, what did you tell him?

A. Told him that the case was in the hands of my attorney, and I would refer it to him. I said that I didn't have anything to do with it now.

Q. Didn't you tell him not to go up to see your mother?

A. I told him that there was no use to go up there, that it
96 was turned over to the attorney.

Q. When you wrote the letter of February 20th, to the company, he said something about your mother going to St. Louis, when did she intend to go to St. Louis?

A. I don't know exactly the date, she was talking about going for sometime.

Q. You didn't know when she intended to go.

A. (No answer.)

Q. How long did she intend to be there?

A. She didn't say, she said she was going.

Q. Isn't it a fact that you wrote that letter of February 20th, at the suggestion of Mr. Scarritt?

A. I wrote it myself.

Q. At whose suggestion?

A. I wrote it myself.

Q. Answer the question, didn't he tell you to write the letter?

A. I was attending to all of the correspondence.

Q. Please answer the question.

A. I wrote the letter.

Q. You have not answered the question Mr. Davis.

A. No, I wrote the letter.

Q. Didn't Mr. Scarritt?

A. I wrote all of this letter?

Q. Did Mr. Scarritt suggest to you that you write that letter or not?

A. No, I wrote the letter.

Q. Why do you qualify the answer?

A. Because I did.

Q. I want to know if Mr. Scarrit suggest- it to you.

A. No sir, *I*he didn't.

MURRAY H. DAVIS.

Subscribed and sworn to before me this 4 day of April 1907.

[SEAL.] WILLARD SMITH,
Notary Public.

97 EXHIBIT A.

Founded 1868 by John F. Hartranft.

Albert H. Lander, President. Horace B. Meininger, Sec. & Gen'l Mgr.

"The Commercial,"

The Oldest Accident Company in Pennsylvania.

Home Office:
N. E. Corner Broad and Chestnut Streets, Philadelphia.

Offices and agencies in all principal cities and towns.

Thomas L. Pillings, V. President. J. Benton White, Treasurer.

Mrs. Mary B. Davis, Fayette, Mo.

DEAR M-DAM-: In response to your letter of January 31, 1907, we again renew our request which you have now twice refused—that the medical officer of the company *ge* permitted to examine the body of A. F. Davis for whose death you make claim. If you again decline to permit such an examination to be made this company will reject any claim made under the policy; one of the essential provisions of the p/licy having been violated.

We shall not submit any claim blanks in this matter until this examination has been allowed.

Will you kindly notify us immediately what you propose to do?

Very truly you-s,

HORACE B. MEININGER, *Secretary.*

98 EXHIBIT B.

Farmers & Merchants Bank.

FAYETTE, MISSOURI, *Feb'y* 20, 1907.

Commercial Mutual Acc-dent Insurance Co., Philadelphia, Pa.

GENTLEMAN: In rep-y to your favor of the 6th will say that I am very sorry that you still insist on having some one examine the body of my deceased husband, as I hoped you would be satisfied with the examination of these doctors here as they are physicians of high standing and fuloy competent to hold such an examination.

However, if you think it is right you may send some one here to examine the bo-y for you. Can't you also send some one authorized who could settle the claim here if your doctor found everything as reported, as most all of the claims have been paid and I am very anxious to have the balance settled as soon as possible.

Then, too, if I should want to compromise the claim in lieu of an examination, your agent would have power to settle it without

any delay. Please let me know just when you will send some one as I am thinking of going to St. Louis for a few days and would like to be here when he comes, so let me know several days in advance.

Yours very truly,
(Signed) MRS. MARY B. DAVIS.

99 EXHIBIT C.

Hotel Howard, Geo. H. Boughner, Proprietor.

FAYETTE, MISSOURI, *Feb'y 27th*, 1907.

Mrs. Mary B. Davis, Fayette, Mo.

DEAR MADAM-: Acting under instructions from the Commercial Mutual Accident Insurance Company of Philadelphia, Pa., I hereby demand that I be allowed to examine the body of Arthur F. Davis, deceased, tomorrow Feb'y 28, 1907, at any time between the hours of 9 A. M. and 4 P. M. as may be most agreeable to you.

Resp'y FRANK G. MASON, M. D.,
Acting for Com. Mut. Accident Ins. Co.

100 EXHIBIT D.

Form No. 1548.

Registry Return Receipt.

Received from the Postmaster at Philadelphia Pa.
Registered letter No. 123, from Fayette Mo.
Addressed to Com. Mut. Accident Ins. Co.
Date 3/26 1907.

COMMERCIAL MUT. ACC. CO.
(Signature or name of addressee.)
F. B. MAXWELL.
(Signature of addressee's agent.)

On the other side thereof is the following:

Post Office Department
Official Business
Penalty of $300 for private use.

Return to:
Name of sender, Mrs. Mary B. Davis, Fayette, Mo.

(The following post-mark)

Philadelphia, Pa.
Feb. 26,
3:30 P. M.
1907.

101 EXHIBIT E.

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, at Jefferson City.

No. 2319.

MARY B. DAVIS, Plaintiff,
vs.
COMMERCIAL MUTUAL ACCIDENT COMPANY, Defendant.

Amended Motion to Quash Return of Sheriff of Howard County to Writ of Summons Herein.

Now comes the above named defendant and appearing specially for the purposes of this motion only, not confessing, but on the contrary, denying that this court has any jurisdiction over the person of this defendant, and moves that the return of the sheriff of Howard County, Missouri to the writ of summons in this cause be quashed, set aside and for naught held, and that this cause be dismissed for want of jurisdiction for the following reasons, to wit:

1. That said return falsely recites that this defendant at the time of the pretended service of said writ was doing business in the State of Missouri.

2. Because Frank G. Mason, the person upon whom the pretended service of the writ of summons herein was made was not such an agent of defendant upon whom legal service of said
102 writ could be made, and said Frank G. Mason is not now and never was an agent of defendant authorized to receive service of process on behalf of defendant.

3. Because said Frank G. Mason, the person named in said return, was induced to come from the State of Illinois into the State of Missouri by a trick and device conceived and executed by the plaintiff herein in order that said writ might be delivered to him.

4. Because said return falsely recites that said Frank G. Mason was at the time of the pretended service of said writ adjusting or settling a loss on a policy of insurance for defendant.

5. Because said return falsely recites that said Frank G. Mason at the time said pretended service was made was aiding or assisting in adjusting or settling a loss on a policy of insurance for defendant.

6. Because said return fails to show that said writ of summons was served in accordance with the statute in such case made and provided.

7. Because said Frank G. Mason was never adjusted or settled a loss on a policy of insurance for defendant, and therefore could not have aided or assisted in so doing.

And hereof defendant prays the judgment of the court as aforesaid.

ROSENBERGER & REED,
Attorneys for Defendant.

To above named plaintiff:

You will hereby take notice that defendant will file the foregoing amended motion to quash the sheriff's return in the above entitled cause.

ROSENBERGER & REED,
Attorneys for Defendant.

103 EXHIBIT F.

Founded 188- by John F. Hartranft.

Albert H. Ladner, President. Horace B. Meininger, Secretary & Gen'l Mgr.

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Home Office:
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Thomas L. Pillings, V. President. J. Renton White, Treas.

PHILADELPHIA, *February* 22, 1907.

Mrs. Mary B. Davis, Fayette, Mo.

DEAR MADAM: The bearer, Dr. Frank G. Mason, is fully authorized to act on behalf of this Company in relation to a post mortem examination on the body of your late husband, Mr. Arthur F. Davis, and is also authorized to adjust the claim.

Very truly yours, HORACE B. MEININGER,
J *Secretary.*

104 EXHIBIT G.

Founded 1888 by John F. Hartranft.

Albert H. Ladner, President. Horace B. Meininger, Secretary & Gen'l Mgr.

"The Commercial"
The oldest Accident Company in Pennsylvania.

Home Office:
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Offices and Agencies in all Principal cities and towns.

Thomas L. Pillings, V. President. J. Renton White, Treasurer.

PHILADELPHIA, *February* 22, 1907.

Mrs. Mary B. Davis, Fayette, Mo.

DEAR MADAM: Your letter of February 20th has been received. We shall immediately arrange to have our medical representative in

Fayette as soon as possible. He will have authority to make an adjustment, should that course be advisable.

Very truly yours, HORACE B. MEININGER,
J. *Secretary.*

105 EXHIBIT H.

Founded 1888 by John F. Hartranft.

Albert H. Ladner, President. Horace B. Meininger, Secretary & Gen'l Mgr.

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Home Office:
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Thomas L. Pillings, V. President. J. Renton White, Treasurer.

PHILADELPHIA, PA., *Jan., 28th,* 1906.

Mrs. Mary B. Davis, Fayette, Missouri.

DEAR MADAM: We do not see our way clear to give the matter of your husband's death consideration under policy AA16048 until you grant us permission and give us an opportunity to examine the body of the deceased, as required by the contract. We have decided that such examination is necessary in order to properly determine the exact cause of death.

Very truly yours, HORACE B. MEININGER,
n. *Secretary.*

(At the bottom left hand corner the following is stamped:)

Accidents
Like Rain,
Happen when
Least
Expected.

[Endorsed:] Depositions. -Davis *vs.* Comm. Mut.

106 Dr. H. K. GIVENS produced sworn and examined, deposes and says:

Q. What is your name, please, Dr.?
A. H. K. Givens.
Q. Do you reside in Fayette?
A. No sir, I reside out about one mile.
Q. Are you connected with the Bank in which Mr. A. F. Davis was interested at the time of his death?
A. Yes sir.

Q. Did you see Dr. F. G. Mason in Fayette on the 27th day of February?

A. Yes sir.

Q. Where was it and what time of day was it?

—. At Hotel Howard, sometime between ten and eleven o'clock.

Q. What were the circumstances of you seeing him on that occasion?

A. Mr. Scarritt came by the Bank and said that there was a gentleman at Hotel Howard representing an Insurance Company. He wanted to know if I could be away from the Bank several hours and go down to the Hotel. He said the gentleman was here to examine the remains of Mr. Davis and if so he wanted me to be present.

Q. Did he say anything about a suit being filed in this case?

A. No sir.

Q. Do you know whether or not a suit had been filed in this case.

A. No sir.

Q. Do you know whether or not a suit had been filed against the defendant?

A. No sir.

Q. Did you see Mr. Hughes, the deputy sheriff, before you went down there?

A. No sir.

Q. Who was present at the time beside yourself and Dr. Mason?

A. Mr. Scarritt and Mr. Murry Davis.

107 Q. Did Dr. Mason request that he be allowed to make an autopsy on the body of Mr. A. F. Davis, deceased?

A. No sir.

Q. Did he say anything about an autopsy?

A. There was something said about examining the body during our conversation.

Q. Were you present when the deputy Sheriff served a summons upon Dr. Mason.

A. Yes sir.

Q. Where had the Deputy Sheriff been during the conversation between you and Dr. Mason.

A. I don't know where he was. I didn't see him.

Q. Do you know how he happened to enter the room?

A. Yes sir.

Q. Do you know how it came about?

A. Yes.

Q. Will you please state how it happened?

A. I saw Mr. Walker enter the Barber Shop and Mr. Scarritt told me to call Mr. Walker in.

Q. And then what occurred?

A. I think after their conversation Mr. Walker called him in.

Q. What occurred just before Mr. Walker called the Sheriff in?

A. A conversation between Dr. Mason and Mr. Scarritt.

Q. Do you remember that Conversation.

A. I think I do.

Q. Will you kindly state it?

A. Mr. Scarritt asked Dr. Mason if he had authority to settle the

claim for the Company and prepared to make a settlement. He stated that he was. That he had authority to settle the claim and to issue a draft in payment of the same.

Q. What then took place?

A. Mr. Scarritt said, why can't we get together on this thing and settle it without going any further.

Q. Then what was said?

A. Mr. Scarritt then ask- him about the money considera-
108 tion, how much he would give on the claim? He said he would give $2500.00 Mr. Scarritt told him he couldn't take that and asked him if he could settle on the basis of ninety cents on the dollar.

Q. Then what occurred?

A. He said he couldn't give that much. Mr. Scarritt then said Doctor you say you have authority to settle the thing, have you any writings to show that you have? He said certainly and he then produced a letter showing the authority. I think I read the letter. Mr. Scarritt said well we can't get together so we are ready to go to the cemetery to examine the body.

Q. And then what occurred?

A. Dr. Mason then said he wasn't prepared to examine the body and wanted to wait two or three days, three I think.

Q. Didn't he say that he wanted to wait until the next morning?

A. He said he was expecting a letter which might get here the next morning.

Q. What then occurred?

A. Mr. Scarritt told him he could not wait any longer and Mr. Walker was then called in and served papers on him.

Q. Did Mr. Scarritt state that he wanted the examination right away?

A. Yes sir.

Q. Did he say any thing about being desirous of catching an early train? The train that left about eleven o'clock.

A. I don't remember.

Q. How long had Mr. Walker been in the Barber Shop by this time?

A. He just came in.

Q. Where was Mr. Hughes, the Sheriff?

A. I did not see him until Mr. Walker came in.

Q. Didn't Dr. Mason say that he was expecting another man from Chicago to assist him in the matter?

A. He said that he would have to have another man to help him.

109 Q. And didn't he say that this other Doctor would be there in the morning.

A. No sir, but I think he was going to wire him to come the next day.

Q. I will ask you whether he said that to Mr. Davis and Mr. Scarritt?

A. I got a little mixed, Mr. Reed, I had a little conversation and I think it was in this conversation afterwards that he said this doctor was coming.

Q. Did he say anything about another Doctor coming to help in the conversation between Mr. Davis and Mr. Scarritt.

A. No sir, I don't think he did.

Q. Are you positive about that?

A. Yes sir, I think I am.

Q. Just how long did Dr. Mason say it would be before he could make the autopsy.

Object- to, because the Doctor has not said just when he could make it. He said it might be two or three days. The question is therefore leading and unfair to the witness.

A. About three days, I think.

Q. Is that as exact as you can put that?

A. I think so, yes.

Q. Do you undertake to say that he did not say the next day or the day after.

A. I don't think he did.

Q. Did Mr. Scarritt give to Doctor Mason any reason for his haste in the examination?

A. — more than we were all ready.

Q. What had been — toward the preparations for the examination?

Q. We were going to prepare for the examination.

Q. What do you recollect about Mr. Scarritt saying if any thing, about going away on the eleven o'clock train.

A. I think he said if they were not going to hold the examination he wanted to go away on the eleven o'clock train.

110 Q. What was the first you heard, Dr. Givens, about Doctor Mason's visit or proposed visit to Fayette on February 27th, 1907 from Mrs. Davis or Mr. Murry Davis?

A. I believe Mr. Murry Davis told me about it when we opened up the Bank that morning.

Q. Did you know anything about a letter Mrs. Davis had written to the defendant on or about Feb. 20th, 1907.

A. No sir, I did not.

Q. Had Mr. Murry Davis told you his purpose in getting Doctor Mason to come here to Fayette?

A. No sir, he had not.

Q. How long were you and Mr. Scarritt, Mr. Davis and Dr. Mason at the Hotel that morning.

A. Possibly an hour, maybe not that long.

Cross-examination:

Q. You and Mr. A. F. Davis had been associated in the Banking business I believe for some years prior to his death?

A. Yes sir.

Q. And since his death you have been president of the Farmers & Merchants' Bank in his place, I believe?

A. Yes sir.

Q. Had you and he been life long friends?

A. Yes sir.

Q. You were educated as a physician and for some years practiced your profession here, had you not?

A. Yes sir.

Q. During these negotiations on the morning of February 27, last, state whether or not you and Frank G. Mason engaged in conversation relative to the merits of this claim?

A. Yes sir.

Q. State whether or not during those negotiations Mr. Mason didn't urge the questionable financial condition of the defendant in justification of the smallness of the offer he made in settlement of it?

111 Defendant objects as not proper cross examination, going beyond the issues for these depositions are being taken for the reason that it is irrelevant, incompetent and immaterial for any purpose.

A. Yes.

Q. Did not at times Mr. Murry Davis engage in conversation relative to the matter in dispute?

A. Yes sir.

Q. And at times wasn't the conversation in general with all of us?

A. Yes sir, during all the conversations.

Q. And you started that these negotiations between us continued about an hour.

A. Yes sir.

Q. Do you not remember, Dr., that when the negotiations were nearly concluded that this agent of the defendant Company had declined to make us an offer to settle the claim on the basis of ninety cents on the dollar? That I said to him in substance, that we had been advised that he would be here to make the examination of the body of Mr. A. F. Davis, and that we were now prepared and ready to tender to him the opportunity to make that examination if he desired to do so and would go to the cemetery with him for that purpose, and that he remained silent for some moments thereafter?

Defendant objects to that question for the reason that it is unfair and puts the words in the mouth of the witness.

A. Yes sir.

Q. And after waiting for some moments for an answer to that suggestion I said that we would construe his silence as a refusal to make the examination and that he continued to remain silent and after waiting some moments to reply I started that then we would govern ourselves according, or words to that effect?

112 Objections to that question because it involves many and separate points mingled in one question and is unfair on that account.

A. Yes.

Q. State, Dr., whether or not that afterwards when Mr. Walker was called, the Deputy Sheriff did not come in the room with him or just following him?

A. No.

Q. What was the fact in that respect?

A. I think Mr. Walker came in and after a conversation called the Sheriff in.

Q. That conversation was in the presence of the gentlemen you have named?

A. Yes sir.

Q. Was not Mr. Walker introduced to Mr. Mason?

A. Yes sir.

Q. And when the Deputy Sheriff came in was not he introduced to Frank G. Mason as the agent of the defendant Company?

Defendant objects to that as it is immaterial.

A. Yes.

Q. Did Mr. Mason make any objection or remonstrance against the designation as him being the agent of the Defendant Company?

Defendant objects to that as being immaterial.

A. No.

Q. And was not the conversation continued and of more or less of general character after these gentlemen had been introduced to Mr. Mason?

A. Yes sir.

Q. About what time was it when the summons in this case was served on Mr. Mason?

A. Somewhere between ten and eleven o'clock.

Q. At any rate, Dr., it was near the conclusion of the negotiation?

A. Yes sir.

113 Q. What time did Mr. Mason leave Fayette on the day you have been referring to?

A. I don't know sir, he was talking about leaving on the three o'clock train.

Q. Where did he go, Dr.

A. To Kansas City.

Q. Did you have a conversation with him that afternoon before he left?

A. Yes sir.

Q. What or anything did he say about going?

Defendant objects, that being incompetent, irrelevant, and immaterial and is hearsay.

A. To consult an Attorney at Kansas City.

Q. Up to that time had he received any further communications or instructions from the defendant than those he had with him at the time the negotiations were carried on that you have already described?

Defendant objects to that unless the witness has shown that he has had some knowledge about the matter.

A. Not that I know of.

I move that we strike that answer out for the reason that the witness is not qualified to testify on the question.

Q. Did he tell you or intimate to you in any way either at the

time or at any other time that he was going to Kansas City to consult an Attorney, that he had received any other or further information or instructions from the defendant than those he had at the time of the negotiations you have referred to as having taken place that morning.

Defendant objects to that question because it is hearsay.

A. I think not.

Q. You have not seen him since he left for Kansas City?

A. No sir.

Q. Do you remember how many days after that Mr. Reed, the defendant's counsel now present, came to Fayette relative to this suit?

114 A. I do not, I understood that Mr. Reed was here but I do not know the time.

Q. Were you in daily association with Mr. A. F. Davis prior to his injury on Jan. 31, last?

Defendant objects as not being within the issued purposes for which these depositions are being taken and is not proper cross examination.

(By Mr. SCARRITT:) I desire to state that I shall now proceed to inquire of this witness relative to the facts material to the merits of this controversy, and not as to the *wishes* raised upon the defendant's motion to quash the sheriff's return. And that the defendant's counsel may exercise his own pleasure as to his appearance in further taking depositions of this witness relative to the allegations of plaintiff's petition. I would like for the counsel to state whether he desires his appearance noted during such inquiry?

(Statement by Mr. REED:) The defendant states that at this time he would prefer to ask a few further questions of this witness relative to the subject matter of the examination in chief and cross examination of this witness, preferring that the re-direct examination should come at this time instead of being postponed to a later period. If however the plaintiff intends to examine this witness at this time upon the merits of the case that the plaintiff will take such testimonies in her own expense and that the defendant refuses to enter any appearance whatsoever at the taking of such testimonies on the part of plaintiff or to cross examine the witness or any other witness produced by the plaintiff for the same purpose.

Q. For how long a time had this association continued?

A. We had been associated in the Bank for about eighteen years.

Q. What had been the condition of Mr. Davis's health prior to Dec. 31, 1906?

A. Very good, in fact, better than common.

Q. Had he had any serious illness whatever for some years prior to that date?

A. No.

115 Q. What were his daily habits for several months prior to his death?

A. He was leading a very active life out of doors a good deal.

Q. Did he ride horseback a good deal during that period?
A. Yes sir.
Q. State whether or not he attended to his business and observed the usual business hours constantly, and without interruption up until the night of Dec. 31, 1907.
A. Yes.
Q. Did he have any physical ailment or disease of any character to your knowledge for some months prior to and up to the night of Dec. 31, last?
A. No.
Q. When did you first see him after his alleged injury?
A. It was about five thirty on the morning of Jan. 1st.
Q. At any rate it was within an hour or two after his injury?
A. Yes sir.
Q. State where he was and what was his condition at that time?
A. I found him at his home about half past five in the morning suffering with a gun shot wound in his side, right side, I suppose it was about three or four inches below the center of the stomach.
Q. What was the nature of the injury?
A. It was the effect of a gun shot wound.
Q. Where was he when you saw him?
A. He was in bed in his house. In his own bedroom.
Q. What was his physical condition?
A. He was then suffering from the shock and of the wound, his pulse were quick and weak.
Q. How frequently did you see him from that forward to his death?
A. Three or four times a day.
Q. Describe his condition from the first time you saw him until his death?
A. When I first saw him early in the morning we thought
116 the ball had probably penetrated the intestines. Well, he was very weak, and continued so up to his death occurred about the fourth of Jan.
Q. Did he at any time recover from the effects of this wound?
A. No indeed.
Q. State whether or not he was ever able to arise from his bed after receiving the wound?
A. No sir he did not.
Q. State whether or not during all that interval his life was in precarious condition.
A. Yes sir.
Q. Where were you graduated as a physician?
A. St. Louis Medical College, 1879.
Q. Did you thereafter practise your profession actively?
A. Yes sir. I practised here for twelve years afterwards.
Q. Thereafter have you practised your profession more or less actively?
A. Yes sir.
Q. You may state from the knowledge of Mr. Davis's condition of health on Dec. 31, last, as you have described it in your testimony

here and from your personal knowledge of the nature of his wound, and of his physical condition thereafter up until the time of his death as you observed it and have described it in your testimony here what was the cause of his death?

A. The gun shot wound, which I have described.

Redirect examination of Mr. REED:

Upon the testimony of this witness heretofore taken by the defendant in support of its motion to quash the Sheriff's return in this case. The defendant examining the witness at this time solely upon those matters and in accordance with the special appearance recorded at the commencement of these depositions.

117 Q. Dr. Givins, did Mr. Scarritt say anything to Mr. Mason about going out to the cemetery?

A. He said he was ready to go and examine the body.

Q. But he did not say anything about going to the cemetery.

A. The cemetery was not mentioned, he said he was ready to go and examine the body.

Q. Now, how long did Dr. Mason remain silent after that?

A. Some little time.

Q. Well, what were the first words if anything did he say after that?

A. I don't remember of him saying anything, in answer to Mr. Scarritt request.

Q. Did Dr. Mason say anything after that?

A. I don't remember.

Q. Do *you* understand you to say that Dr. Mason said nothing more that morning.

A. We were all talking but I don't remember anything he said.

Q. You wouldn't undertake to say what he said next.

A. No sir.

Q. Just how much time elapsed after Mr. Scarritt said we are ready to go to view the body and from the time he said, we construe your silence as a refusal?

A. I just don't know how long it was.

Q. Mr. Scarritt made these remarks in quick succession?

A. Well, I don't know sir, Dr. Mason had plenty of time to act if he wanted to.

Q. But you don't know how long it was?

A. No sir.

Q. You say you were at the hotel for some time, have you any way to arrive at the length *of* time that you Mr. Davis, Mr. Scarritt and Dr. Mason were there?

A. I don't remember just how long we were there, we all discussed the case.

118 Q. You would have to guess at the exact time?

A. I think it would be guess work, but I think it was about one hour.

Q. Might it have been — much shorter period?

Object- to as an attempt to cross-examine the defendant's own witness.

A. I couldn't say.

Recross-examination by Mr. SCARRITT:

Q. Where was Mr. Davis's body at the time these negotiations were in progress?

A. Down in the City Cemetery.

Q. Was not Mr. Mason advised on that fact, did he know it?

A. Yes sir.

Q. About how far was that from Hotel Howard?

A. Not quite a half mile. I think we discussed it in our conversation about the cemetery.

Q. Were you not prepared and ready to go to the cemetery for the purpose of this proposed inspection in case it would have been determined upon?

A. Yes sir.

H. K. GIVENS.

Subscribed and sworn to before me this 4th day of April 1907.

[SEAL.] WILLARD SMITH,
Notary Public.

119 A. W. WALKER.

Q. Your name is A. W. Walker.

A. Yes sir.

Q. Do you live in Fayette, Mo.

A. I do.

Q. You are one of the Attorneys of Record in this case?

A. I am.

Q. When were you first consulted in regard to this case by the plaintiff or any one in their behalf?

A. Murry Davis spoke to me several times about policies, but I think did not mention this one but a day or two before Mr. Mason came here the last time.

Q. Did he consult you about sending a telegram to Dr. Mason about Feb. 5th, 1907.

A. No sir, he did not.

Q. Did you file the papers in this case?

A. I did.

Q. By that you mean the petition?

A. Yes.

Q. Did you attend to having a summons issued in this case?

A. I did.

Q. And when was the petition filed, on Feb. 27th, 1907?

A. It was filed about ten minutes before papers were served on Dr. Mason.

Q. When was that perition prepared if you know?

A. I don't know.

Q. When did you first get possession of it?

A. I really don't know either the day before Doctor Mason came or the day that he came to Fayette.

Q. Is that your best recollection about that, Mr. Walker?

A. I saw the petition the day before Mason came but I don't know whether it was turned over to me or not.

Q. Where did you see that petition?

A. Murry Davis showed it to me.

120 Q. You say that Mr. Murry Davis showed it to you and where were you at that time?

A. I think I was at the Court house.

Q. Now that morning of February 27th, 1907, where were you while Mr. Scarritt and Doctor Mason were down at the Hotel?

A. I left my office about the time they went to the Hotel. And I was on the street, then at the courthouse a few minutes, and at the Hotel a short time previous to the time I went there with the Deputy Sheriff with the papers.

Q. Did you communicate with Mr. Scarritt after he went up to the Hotel and before you went down there with the Deputy Sheriff?

A. I did not.

Q. What time were you instructed to file the suit?

A. After the parties had time determined to have the examination of the body or not.

Q. When did you receive those instructions and from whom?

A. Well, that was the understanding between Mr. Davis and Mr. Scarritt and myself.

Q. That was the understanding before they went down to the Hotel?

A. Yes sir.

Q. After you left them and they went down to the Hotel did you communicate with Doctor Givens, Mr. Murry Davis, Mr. Scarritt or anyone else in reference to the filing of this suit and before you actually filed it?

A. I went to the Hotel myself and saw Murry Davis, Doctor Mason, Mr. Scarritt and Doctor Givens in a conference about the case, and after they had been in conference some time I concluded that they were not going to reach any agreement and decided to file the papers.

Q. Did you have any conversation with them the first time you went down there?

A. No conversation the first time.

Q. You filed the suit then without any actual knowledge of the result of the conversation of Doctor Mason and the parties representing Mrs. Davis.

121 A. The only knowledge I had was from the appearance of the parties in the conference and I judged they were not getting together.

Q. Had you had any instructions as just how long to wait before filing that suit?

A. Time was to be given for deciding on an examination of the body or a settlement of the case before any suit should be filed.

Q. How much time were you to allow?

A. I don't know that any definite time was decided upon.

Q. Isn't it a fact that you were requested to file the suit at all events that there was no prospect of a settlement or adjustment?

A. No, I didn't know but what I would meet them going to the cemetery or preparing to go.

Q. You didn't think you would did you?

A. I didn't know, I had had no conversation with Doctor Mason himself and I didn't know his state of mind about the matter.

Q. Wasn't it the intention of Mr. Scarritt and Mr. Davis not to allow any autopsy to be made.

A. I understood that they were ready for an autopsy that day.

Q. No preparations was made for one was there?

A. The doctors were all here who held the first examination and could be had on a moment's notice.

Q. Was it your intention to call them in to assist.

A. I had no control of those plans.

Q. Had they been spoken to so far as you know?

A. I had not but I don't know whether others had spoken to them or not.

Q. What Doctors were they?

A. I believe they were Dr. Lewis, Dr. Wright and Dr. Richards.

Q. How long did you wait out in the Barber Shop with Mr. Hughes, the Deputy Sheriff, before you were called in by Mr. Scarritt?

122 A. We were in the barber shop about five minutes, maybe a little over.

Q. When did you first speak to the Sheriff or Deputy Sheriff about being ready to serve the summons in this case?

A. I didn't speak to either of them about being ready.

Q. What did you speak to them about?

A. Papers were issued about ten minutes before they were served, I met the Deputy Sheriff across on the walk to the courthouse and we went immediately to the Hotel a half a block away to serve the papers. That was the first time the matter was mentioned to the Deputy Sheriff, it never was mentioned to the Sheriff.

Q. The subpœna was also served upon Dr. Mason at the same time the summons was?

A. I believe it was, about the same time.

Q. And a notice to take depositions.

A. Yes I think so.

Cross-examination—A. W. WALKER:

Q. Were you present at the return day of that subpœna and at the time and place of taking the depositions stated in that notice?

A. Yes I was.

Q. Did you there and then take depositions under that notice?

A. I did.

Q. Did Frank G. Mason respond to that subpœna or was he present at the time and place stated for taking the depositions?

A. He did not respond and was not present during the day stated.

Q. Did you as Attorney desire to take the depositions and were you prepared to do so at that time and place?

A. I subpœnaed him for that purpose and desired to get his deposition but failed to do so because he did not appear.

A. W. WALKER.

Subscribed and sworn to before me this 4th day of April 1907.
[SEAL.] WILLARD SMITH,
Notary Public.

123 Mr. W. C. SCARRITT being produced and sworn on the part of the defendant deposes and says:

Q. You are one of the members of the firm of Scarritt & Jones, Attorneys of Record for the plaintiff in this case?

A. I am.

Q. What time did you arrive in Fayette on or about Feb. 27th, 1907?

A. I arrived at the depot on the M. K. & T. train at about six thirty-five A. M. Feb. 27th, 1907.

Q. When was the petition in this suit drawn, Mr. Scarritt?

A. My best recollection it was dictated a day or two prior to Feb. 27th, last.

Q. Had you decided to bring suit against the defendant prior to this?

A. I think not.

Q. Were you preparing to do so, however?

A. I made a careful preparation to represent our client's controversy that had arisen and if you call dictating a petition a preparation for suit that as afore stated had been done.

Q. I will ask you whether the letter of Feb. 20th, 1907 signed by Mrs. Davis, the plaintiff in this suit, and addressed to the defendant, and referred to in her testimony and prepared by Mr. Murry Davis was written at your directions or under your instructions to write such a letter or similar letter?

A. I had no knowledge of the writing or the preparation of that letter before the date on which it is reported to be written or before the date that I have since been informed it was written and mailed to the defendant, and I did not instruct such letter to be written or sent to the defendant.

Q. I will ask you whether or not you directed the plaintiff, or any one acting for her prior to February 20th, 1907, to direct a letter to the defendant suggesting to the defendant that any person that might be sent to make an autopsy or examination of the body of A. F. Davis should be authorized to make a settlement or adjustment upon a claim upon which this suit is founded?

124 A. Mr. Murry Davis consulted me relative to this controversy by mail, and I endeavored to give him my professional advise by mail, and I have not that correspondence before me and have not reviewed it since the correspondence took place and I think I have answered the counsel's questions relative to the communication between the plaintiff and defendant in evidence fully and fairly and I decline to attempt to state the contents of my written communication referred to or to disclose the professional communications contained in them, other than I may have done in the testimony already given.

Q. How long, Mr. Scarritt, did that conversation between Doctor Mason and yourself, Mr. Murry Davis and Doctor Givens last over

there in the Hotel in Fayette, on the morning of February 27th, 1907?

A. To the best of my recollection it extended over about fifty minutes.

Q. Did you make any note of it by the watch at that time?

A. I did not, I was keeping fairly well advised of the time of my stay here in Fayette on that morning.

Q. Was it your purpose to leave on the train that left here about eleven o'clock that morning?

A. I came here with the fixed purpose of staying here as long as was reasonably necessary, whether one, two or three days, to bring this controversy to a definite state of advancement, and adhered to that purpose without wavering until I thought that had been accomplished, and I reached that conclusion about six minutes of eleven o'clock that morning and not until the busses had left the Hotel for the train, and then I concluded in as much as that I was advised that the train was a few minutes late to endeavor to catch the M. K. & T. train North, which was due to leave here at eleven o'clock. I then requested that a telephone message be sent to Mrs. Davis to have my valise which was at her house, where I had
125 up to that moment expected it to remain during the day and possibly the night, to be sent in haste to the train, and if it didn't get there in time to have it forwarded to me by express. The train was a few minutes late, I caught it and got my grip just as the train was going out.

Q. Had you made any arrangements with any of the local physicians to be present at the examination of the body of Mr. A. F. Davis to represent the plaintiff?

A. Mr. Reed, to be perfectly candid with you I was thoroughly satisfied in my own mind that neither your Company nor Frank G. Mason, who was here as an agent, had any real idea of doing such a horrible thing as examining the body of Mr. A. F. Davis, one of the most honored and lamented citizens of this County, after it had lain in its grave for more than one month and a half, for the purpose of mutilating and carving it up. I was led to this belief by a perusal of correspondence between the plaintiff and your Company and the conduct of this Frank G. Mason in Fayette on January 14th or 15th as it was reported to me, but I was determined that so far as my advice could prevail that the obligations of the plaintiff, under the contract of the policy of Insurance, sued on in this case, as I construed them, should be met up to and complied with so fairly and fully as to admit of no reasonable doubt in any honest mind that they had been fully complied with by the plaintiff and to that end I requested Doctor Givens, who is a reputable citizen of Fayette and who was a friend of Mr. Davis, to accompany me and Mr. Davis to an interview with this creditable agent of the defendant and that if an examination of the body was to be made by him or for him or the defendant, to accompany us and participate in that examination. I also inquired if the other physicians here who had waited on Mr. Davis, were present here in Fayette, and advised that several creditable and reputable persons be at hand to accom-

pany us on that mission, and to see that no sacrilege was committed in that attempt.

126 Defendant moves to strike out the answer to the question for the reason that it is responsive to the question and is composed of testimony that is hearsay, and conclusions on the part of the witness.

Q. It was not the intention to allow an autopsy to be held?

A. I don't care to make any further answer to this question other than of the previous one.

Q. As I understand you, you did not suppose that the Company would insist upon having an autopsy?

A. I make the same answer to this question as I did to the last one.

Q. What conversation did you have with Doctor Mason on the morning of February 27th, 1907?

A. The interview between Frank G. Mason, Doctor Givens, Murry Davis and myself as I have aforesaid covered about fifty minutes. The substance of that conversation and negotiation carried on as had been stated by Mr. Murry Davis and Doctor Givens and I hardly think you wish me to consume one half or three quarters of an hour in having me reiterate my recollections of what occurred.

Q. Are your statements as given here to day correct?

A. In substance, according to my recollections they are. There was considerable conversation and discussions and details that I can recall that I think they have not narrated but as I said the substance of what occurred has been fairly stated by those witnesses.

Q. I will ask you whether or not Mr. Mason said he would be ready on the day after the day on which you had an interview to make the autopsy?

A. My recollection is quite clear that he made no such statement and conveyed no such opinion. In the early part of the discussion I urged him to state if he desired an examination then it should be made. And he unequivocally stated that he desired first to have further communications with the defendant Com-

127 pany, and that if he had an examination he wouldn't be ready for about three days.

Q. By whom were you advised that Dr. Mason would be in Fayette, Feb. 27th, 1907.

A. I have not come here on any occasion except upon request of Mrs. Davis whose appeals to me, to come when the representative of this defendant was likely to be here, have been pathetic in the extreme.

Defendants moves to strike out the latter part of the answer as not being responsive to the question.

It was stipulated and agreed by Mr. Scarritt, Attorney for the Plaintiff and Mr. Reed, Attorney for the Defendant, that the evidence of Mr. Scarritt should not be signed.

128 *Notice to Take Depositions.*

UNITED STATES OF AMERICA, *Western District of Missouri, ss:*

In the Circuit Court of the United States for the Central Division of the Western District of Missouri, sitting at Jefferson City.

MARY B. DAVIS, Plaintiff,
against
THE COMMERCIAL MUTUAL ACCIDENT COMPANY, Defendant.

To the above named defendant or Rosenberger and Reed, its attorneys of record:

You are hereby Notified That depositions of witnesses to be read in evidence in the above entitled cause on the part of the plaintiff will be taken at the office of Scarritt, Scarritt & Jones, 707-712 American Bank Bldg., corner of 8th & Delaware Streets in Kansas City in the County of Jackson and State of Missouri on the 11th day of March 1907 between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day; and that the taking of said depositions, if not completed on that day, will be continued from day to day, at the same place and between the same hours, until completed.

A. W. WALKER AND
SCARRITT, SCARRITT & JONES,
Attorneys for Plaintiff.

STATE OF MISSOURI, *County of Jackson, ss:*

Edward S. North, of lawful age, being duly sworn, upon oath says that he served the attached notice upon Rosenberger and Reed, attorneys of record for plaintiff in the within mentioned cause by delivering a true copy thereof to J. C. Rosenberger at his office on the 5th day of March, 1907.

EDWARD S. NORTH.

Subscribed and sworn to before me this 11th day of March, 1907.

[SEAL.] ETHEL MULLAY,
Notary Public.

My commission expires Aug. 20, 1908.

129 Depositions of witnesses, produced, sworn, and examined on the 11th day of March, in the year of our Lord 1907, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at the office of Scarritt, Scarritt & Jones, 707-712 American Bank building, corner of 8th and Delaware streets, in Kansas City, in the County of Jackson and State of Missouri, before Bertha L. Johnson, a notary public within and for said county and State, in a certain cause now pending in the Circuit Court of the United States for the Central Division of the Western District of Missouri, sitting at Jefferson City, between Mary B. Davis, plaintiff, and The Commercial Mutual Accident Company, defendant, on the part of the plaintiff.

Messrs. Scarritt, Scarritt & Jones appearing for the plaintiff.

J. C. ROSENBERGER, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and saith:

Direct examination by Mr. W. C. SCARRITT:

Q. You are a member of the firm of Rosenberger & Reed, attorneys at law?

A. Yes sir.

Q. Where is the office of your firm?

A. In the New York Life Building in Kansas City, Missouri.

Q. You and Mr. Reed have been associated some time in the practice of law?

A. Yes, sir.

Q. And are the attorneys of the defendant, I believe, in this case?

A. Yes.

Q. Were you such attorneys prior to February 28th last?

A. I cannot say that I am regularly employed by the defendant as attorney. I have been consulted by it before with respect to some business arising outside of this state.

Q. Were you so consulted at your office?

A. No; my business with them was entirely by correspondence.

Q. Are you acquainted with Dr. Frank G. Mason?

A. Yes, sir.

130 Q. Was he at your office on February 28th last, the day after the institution of this suit?

A. Yes.

Q. About what time was he there?

A. He was there some time during the forenoon.

Q. Were you retained by the defendant as attorney in this case before his appearance at your office?

A. No; nor at the time of his appearance.

Q. State whether or not he consulted with you relative to this case?

A. He informed me of what had transpired on the preceding day.

Q. Did he solicit your retention as an attorney in this suit?

A. No; he did not.

Q. He came direct from Fayette, Missouri to your office after service of summons in this case upon him?

A. That I don't know. I assume he came to my office shortly after he was served with summons.

Q. Had you been retained in this case directly or indirectly prior to the time he appeared at your office on that occasion?

A. No sir; I was not.

Q. Did you state to him in that interview the terms upon which you would be employed or on which you would undertake employment for the defendant in this case?

A. That matter was not discussed with him at all.

Q. He is a resident of Chicago, Illinois, I believe?

A. Yes; he is a practicing physician there. I think he has an office at 163 State Street.

Q. Had you any knowledge of the institution of this suit until you were so informed by Dr. Mason?

A. No.

Q. Did he leave a copy of the petition and summons in this case with you on that occasion?

A. He did pursuant to directions contained in a telegram he had received from the defendant directing him to do so.

Q. Have you that telegram with you?

131 A. No.

Q. Will you furnish a copy of it to be attached to this deposition

A. No; I regard that as a privileged communication between me and my client.

Q. Had you been retained in this suit, directly or indirectly, prior to the appearance of Dr. Mason at your office on the occasion referred to?

A. No; I had not and I can't say I was retained then.

Q. Did Dr. Mason consult with you about the case and submit to you a copy of the petition and writ in the case?

A. He informed me of what had transpired at Fayette and of the bringing of this suit and the purpose of it, and he left with me, as already stated, a copy of the petition and summons and also a notice to take depositions and also a subpœna which had been served upon him and he consulted me with reference to his obligation to appear before a notary at Fayette in obedience to the command of the subpœna. That was the main purpose for which he consulted me.

Q. Did he also consult with you about the petition and summons in this case?

A. He did not; he merely left it with me and informed me of the circumstances under which it had been delivered to him.

Q. Did he consult with you or inform you as to certain written communications he had delivered to Mrs. Davis relative to his authority to act as agent for the defendant?

A. I recollect no discussion on that subject, and if I did I would not feel at liberty to divulge it.

Q. I am not asking you for the contents, but merely to state whether or not he consulted with you with reference to the documents I referred to?

A. I will say that so far as Dr. Mason is concerned his consultation in the main related to his own personal duty in respect to the

subpœna to appear at the taking of depositions; whatever else he said to me was information concerning what had happened.

Q. He did leave with you the petition and summons in the case?

A. He did and said I would be advised further by the company in all probability which the company afterward did.

132 Mr. SCARRITT: I desire to give you notice and through you to notify the defendant to produce in the court room of the United States Circuit Court at Jefferson City at the time of the hearing upon the motion of the defendant to quash the return of the sheriff, and also upon the hearing of this cause, any and all communications and writing between the defendant company and the said Dr. Frank F. Mason, between the 5th day of January, 1907 and the 5th day of March, 1907, relative to the compromise and settlement of the claim and suit and relative to the examination of the body of the deceased Arthur F. Davis, and relative to proofs of death and relative to the visit of the said Dr. Frank G. Mason to the city of Fayette, relative to either of his two visits to Fayette, the last of which occurred on or about February 27th last, and his visit to Kansas City about February 28th, whether these communications are by letter or telegraph, for the plaintiff deems such communications to be relative evidence upon the issues to be tried and requires such documents in making her proof of the issues, both upon the said motion and the merits of this action.

Mr. ROSENBERGER: I wish to say that I am not appearing at this deposition voluntarily but am here in obedience to a subpœna which has been served upon me to appear at this time and place, and that my appearance here is not to be construed as an entry of appearance and I am not appearing here as attorney for the defendant but solely as a witness pursuant to this subpœna.

J. C. ROSENBERGER.

Subscribed and sworn to before me, on the day, at the place, and within the hours first aforesaid.

[SEAL.] BERTHA L. JOHNSON,
Notary Public.

133 And afterwards on the 30th day of April, 1907, the court did overrule and deny said amended motion to quash and set aside said return, to which action and ruling of the court the defendant excepted at the time and still excepts.

And that the above matters and things may be made a part of the record in this cause defendant tenders this its bill of exceptions and prays that the same may be signed, sealed and allowed as such, which is accordingly done this 2nd day of May, 1907.

(Signed) SMITH McPHERSON, *Judge.* [SEAL.]

134 UNITED STATES OF AMERICA, *ss:*

I, Adelaide Utter, Clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the above and foregoing is a full, true and com-

plete copy of the record, bill of exceptions, assignment of errors and all proceedings in the cause wherein Mary B. Davis is plaintiff and Commercial Mutual Accident Company is defendant, as fully as the same appears on file and of record in my office.

Witness my hand as clerk and the seal of said court. Done at office in Kansas City, Missouri, this 20th day of June, A. D. 1907.

[Seal of the United States Circuit Court, Western Division, for the Western District of Missouri.]

ADELAIDE UTTER, *Clerk.*

Endorsed on cover: File No. 20,771. W. Missouri C. C. U. S. Term No. 114. Commercial Mutual Accident Company, plaintiff in error, *vs.* Mary B. Davis. Filed June 27, 1907. File No. 20,771.

In the Supreme Court of the United States, October Term, 1909.

No. 114.

COMMERCIAL MUTUAL ACCIDENT COMPANY, Plaintiff in Error,
vs.
MARY B. DAVIS, Defendant in Error.

Stipulation.

It is hereby stipulated as follows:

That by inadvertence of the Clerk of the Court below, there was omitted from the transcript of the record filed in this court the following notation appearing at the foot of the original bill of exceptions filed in this cause and set out in the printed record on pages 15 to 81 inclusive: "O. K., Scarritt, S. & Jones."

That said notation was made by Mr. W. C. Scarritt Attorney of record for Mary B. Davis, defendant in error, and was made before the said Bill of Exceptions was signed by the trial Judge; that by reason of the said omission of the Clerk of the Court below, the said notation does not appear on the printed record; that the said notation may be considered by the Supreme Court as a part of the record in the said cause with like effect as if the said omission of said Clerk had not been made, and that the Clerk of the Supreme Court of the United States, with the permission of said court, may amend the printed record in accordance with this stipulation.

Feb. 8, 1909.

J. C. ROSENBERGER,
J. C. JONES,
Attorneys for Plaintiff in Error.
W. C. SCARRITT,
Attorney for Defendant in Error.

[Endorsed:] File No. 20,771. Supreme Court U. S., October Term, 1908. Term No. 114. Commercial Mutual Accident Co., Plff in Error, *vs.* Mary B. Davis. Stipulation to correct transcript of record. Filed Feb'y 11th, 1909.

Office Supreme Court, U. S.
FILED.
JAN 2 1909
JAMES H. McKENNEY,
CLERK

Number 114.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

COMMERCIAL MUTUAL ACCIDENT COMPANY,
PLAINTIFF IN ERROR,

VS.

MARY B. DAVIS, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES C. JONES,
JULES C. ROSENBERGER,
KERSEY COATES REED,
Attorneys for Plaintiff in Error.

Number 114.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

COMMERCIAL MUTUAL ACCIDENT COMPANY, PLAINTIFF IN ERROR,

VS.

MARY B. DAVIS, DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

(References are to pages of the printed record.)

Error to the Circuit Court of the United States for the Western Division of the Western District of Missouri to reverse a judgment rendered in favor of Mary B. Davis against plaintiff in error.

The case comes directly to this court on the following certificate of the court below that a question of jurisdiction is involved (14).

> "**CERTIFICATE OF JUDGE THAT A QUESTION OF JURISDICTION IS INVOLVED IN THIS CAUSE.**
>
> "I hereby certify to the Supreme Court of the United States solely the question as to whether there has been such service of process upon defendant in this cause as to authorize this court to take and

exercise jurisdiction over defendant. Said question arose on defendant's amended motion to set aside the return of service made by the sheriff of Howard County, Missouri, to the writ of summons herein and to dismiss this cause for want or jurisdiction over defendant. This court, conceiving that the service of said summons upon defendant was valid and sufficient to give this court jurisdiction, overruled said motion, proceeded to exercise said jurisdiction and rendered final judgment against defendant. No opinion was filed by the court.

This certificate is made conformably to Act of Congress of March 3, 1891, Chapter 517, on this 7th day of June, A. D. 1907.

(Signed) SMITH MCPHERSON,
Judge."

A similar certification is made by the court below in its order allowing the writ of error, although this was probably superfluous (12).

This suit was commenced by Mary B. Davis, the defendant in error, a resident of Fayette, in Howard County, Missouri, against the Commercial Mutual Accident Company, a Pennsylvania corporation, the plaintiff in error. The suit was filed in the Circuit Court of Howard County, Missouri, and was by due proceedings removed into the Circuit Court of the United States for the Central Division of the Western District of Missouri, whence it was afterward transferred into the court below.

As indicated by the above quoted certificate, the question involved is as to whether there has been such service of process as authorized the court below to exercise jurisdiction over the person of defendant and to enter judgment against it.

In the statement which follows, Mary B. Davis is referred to as the plaintiff and said Company as defendant.

The defendant made no appearance in the court below or in the State Court except specially for the purpose of contesting the jurisdiction of the court. This it did

by filing timely motions to set aside the return of service and by supporting the same by proof on the hearing thereof. Said motion (16, 18), was in substance grounded on the total want of power or authority of the person to whom process was delivered to receive process on defendant's behalf, also because defendant has never transacted business in Missouri, also because the person served had been induced to come into Missouri by a trick and device conceived and executed by plaintiff in order that the writ of summons might be delivered to him, also because the recitals in the sheriff's return are false and untrue, and even if true do not disclose a valid service either under the laws of the United States or of the State of Missouri.

The facts can hardly be more succinctly stated than by setting forth the affidavits made by Dr. Frank G. Mason, the person upon whom the attempted service was made and of Mr. H. B. Meininger, the secretary of defendant (Rec. 19-30). Same were read in evidence on the hearing of the motion to quash the sheriff's return in the court below and omitting caption, are as follows:

AFFIDAVIT OF FRANK G. MASON.

"*State of Illinois, County of Cook, ss.*

"Frank G. Mason, of lawful age, being duly sworn, on oath states:

"My name is Frank G. Mason. I am a graduate of a regular allopathic medical institution and am by profession a practicing physician and surgeon. I have practiced my profession continuously in the City of Chicago, Illinois, fifteen years. I have an office at Room 616, Stewart Building, 92 State Street, in said City of Chicago, and at my office I receive, treat and consult with my patients and transact the ordinary business of a physician there. My residence is at 474 West Congress Street in said City of Chicago. I am not now and never have been regularly or continuously in the employ of the above named defendant, but have occasionally performed, when so requested by defendant, services for it in the way of making medical examinations and reports concerning

persons insured with defendant who have met with accidental injury and who have had claims pending against defendant. I have not and never have had any contract of employment with defendant. I receive no salary from the defendant, but am paid for my services in each particular case according to what the services may be reasonably worth. I have never had such contract relations with defendant as obligated me to act for it in any case, and have always been free when requested by defendant to act for it in making investigations, etc., to either accept or decline the engagement, as I saw fit. The claims I have investigated for defendant have been few and far between. In the year 1904 I acted for the defendant as aforesaid in one case only. In the year 1905 I acted for the defendant in the capacity aforesaid in one case only. In the year 1906 I acted for the defendant in the capacity aforesaid in three cases only, and in the year 1907 and up to the time the attempted service of process was made on me in this suit I had attended to no cases whatsoever for the defendant nor transacted any business for them. I have never had general authority to settle or adjust claims on behalf of defendant, and if in any instance an offer of compromise had been made to me I had no right or power to bind the company with respect thereto, unless special authority was given me by the company to settle or adjust that particular case, and in such instances the only power I had was to inform the company of the proposition. Each instance in which I have performed any service for the company has been treated by both myself and the company as a separate and distinct item, there being no continuous relationship between me and the said company.

"On or about the 12th day of January, 1907, I was requested by Mr. H. B. Meininger, secretary and general manager of the above named defendant, to go from my home in Chicago, Illinois, to the Town of Fayette, in Howard County, Missouri, for the purpose of investigating the nature and extent of alleged accidental injuries alleged to have been sustained by one A. F. Davis, late husband of the plaintiff herein, which injuries it was claimed had resulted in the death of said A. F. Davis, and to investigate the circumstances under which said injuries had been inflicted.

"Pursuant to said request, I visited said town of Fayette on or about the 14th day of January, 1907, and

made inquiry into the facts surrounding the said death, and during said investigation I was credibly informed that the deceased was sixty-four years of age; that for many years he had suffered with a nervous affection and that he was not in robust health. That, although a man of moderate fortune, he carried life insurance policies on his life aggregating $133,000, and accident insurance upon his life aggregating $16,000, or a total of $149,000. That at about 4:30 o'clock on the morning of December 31, 1906, he entered the bath room of his residence in Fayette, Missouri, and while alone in said bath room, said A. F. Davis received the injuries from which it was alleged his death had ensued; that said injuries had not been at first regarded as serious, and that deceased had died on the morning of January 4, 1907. I interviewed the various physicians who had been in attendance upon the case, and taking into consideration the nature of the examinations made by them as related by them to me of the injuries, both before and after the death of said deceased, and taking into consideration the impaired physical condition of the deceased at the time of the alleged accident, I felt that it had not been established that the injuries alone had caused his death. I felt that in order to ascertain the cause of death it would be necessary that I examine the body of the deceased. I had learned in the course of my investigation that no thorough examination had been made of the body after death and that only a superficial examination had been made. I had been provided with a copy of the policy upon which this suit is brought and knew that said policy reserved to the defendant the right to make an examination of the body of said Davis in respect to any alleged injury or cause of death. The said A. F. Davis had made certain warranties in his application to defendant for the insurance respecting his physical condition, and it was my opinion that my duty required me to examine the body of said Davis to ascertain to what extent his impaired physical condition had contributed to his death, there having been, in my judgment, a breach of warranty committed by the said A. F. Davis in his application for the insurance with respect to his previous state of health.

"I further found that the body of said Davis had been buried before plaintiff or any one in her behalf had notified the defendant of any alleged accident or that any

claim was to be made. I accordingly requested plaintiff to accord me the right to examine the body of said Davis, which request was by the plaintiff and her representatives refused. And thereupon, being unable to complete my investigation by reason of said refusal, I returned to my home in Chicago, arriving there on January 16, 1907, and made report to the defendant.

"At none of the times aforesaid had any authority been conferred upon me by the defendant to settle or compromise the claim of plaintiff, and if any suggestion of compromise had been made at any of said times I would have had no power to deal with the same otherwise than by transmitting the same to the officers of the defendant at its home office, if I saw fit to do so, nor was I under any obligation to even do that.

"After my return to Chicago on January 16, and after I made my report to the company I gave no further attention to this case until on or about February 24, 1907, I was again requested by the defendant to go to Fayette, Missouri, the defendant furnishing me with a copy of the following letter received by it from the plaintiff herein, and copy of its reply by it to plaintiff, to-wit:

" 'Fayette, Missouri, Feby. 20, 1907. Commercial Mutual Accident Insurance Co., Philadelphia, Pa., Gentlemen:

" 'In reply to your favor of the 6th will say that I am very sorry that you still insist on having some one examine the body of my deceased husband, as I hoped you would be satisfied with the examination of these doctors here, as they are physicians of high standing and fully competent to hold such an examination.

" '**However, if you think it is right you may send some one here to examine the body for you. Can't you also send some one authorized who could settle the claim here if your doctor found everything as reported, as most all of the claims have been paid and I am very anxious to have the balance settled as soon as possible.**

" '**Then, too, if I should want to compromise the claim in lieu of an examination, your agent would have power to settle it without any delay. Please let me know just when you will send someone, as I am thinking of going to St. Louis for a few days and would like to be here when he comes, so let me know several days in advance.**

" 'Yours very truly, Mrs. Mary B. Davis.'

" 'Philadelphia, February 22, 1907. Mrs. Mary B. Davis, Fayette, Mo., Dear Madam: Your letter of February 20th has been received. We shall immediately arrange to have our medical representative in Fayette as soon as possible. He will have authority to make an adjustment, should that course be advisable. Very truly yours, Horace B. Meininger, Secretary.'

"The company also furnished me with the following letter addressed to the plaintiff, the same to be exhibited to her in case she requested it:

" 'Philadelphia, February 22, 1907. Mrs. Mary B. Davis, Fayette, Mo., Dear Madam: The bearer, Frank G. Mason, is fully authorized to act on behalf of this company in relation to a post mortem examination on the body of your late husband, Mr. Arthur F. Davis, and is also authorized to adjust the claim. Very truly yours, Horace B. Meininger, Secretary.'

"Until receipt of said letter of February 22, 1907, I had had no authority whatsoever to settle or adjust plaintiff's claim.

"Having noted plaintiff's request in her above quoted letter of February 20, asking that she be advised when the company would have its physician in Fayette, I, on February 25, 1907, telegraphed to Mrs. Davis, the plaintiff, as follows:

" 'Will it be convenient to see me tomorrow, Tuesday morning?'

"On the same day I received a reply by telegraph, signed M. H. Davis, and reading as follows:

" **'Come Wednesday morning.'**

"Believing that plaintiff, when she wrote the above letter of February 20, 1907, in good faith intended to permit an examination to be made of the body of the deceased, I, before leaving Chicago, arranged with Dr. Lee Shaw, an eminent surgeon of Chicago, to meet me at Fayette upon telegraphic notice, and there assist me in making said examination of said body. The Wednesday referred to in the aforesaid telegram from plaintiff or her agent, inviting me to come to Fayette, was February 27, 1907.

"In response to said invitation, I left Chicago on the

evening of February 26th, 1907, and arrived at Fayette on the morning of February 27th. Shortly after I arrived at the hotel at Fayette, to-wit, at 9:35 a. m., I was called to the telephone by Mr. M. H. Davis, a son of plaintiff, who said over the telephone, "You are here, are you?" I assured him I was, and he asked me to come over to the Farmers & Merchants Bank of Fayette, with which he is connected. I told him I would be there in the course of about half an hour. At 10:10 a. m. said M. H. Davis, and Dr. Givens, a former partner of the deceased and at one time his family physician, called on me at the hotel with a gentleman whom said Davis introduced as his friend, Mr. Scarritt. Nothing was said as to Mr. Scarritt being one of the attorneys for the plaintiff or that he had come to Fayette from Kansas City, Missouri, on the business, nor did I know this fact until later. Mr. Scarritt thereupon opened the conversation by asking me if I still desired to make an examination of the body of A. F. Davis. Upon being answered in the affirmative, he asked me if there was not some chance to get together on a compromise. I told him I preferred not to discuss that matter at that time. After some further talk he asked me if I was authorized to make a settlement or autopsy. I answered in the affirmative, and he thereupon asked me if I had any credentials. Whereupon I produced the above quoted letter of February 22, 1907, addressed to plaintiff by the defendant, beginning as follows: 'The bearer, Mr. Frank G. Mason, etc.'

"Thereupon Mr. Scarritt made me an offer of compromise which I declined and I made him a counter-proposal. The words had hardly left my mouth when Mr. Scarritt called Dr. Givens to one side and immediately two men, strangers to me, came into the room from the barber shop in the rear of the hotel, one of whom was a deputy sheriff who then and there delivered to me the summons in this case and also a notice that depositions would be taken in this case at Fayette, Missouri, on March 4, 1907, on behalf of the plaintiff; also a subpoena commanding me to appear before one, Kirby, a notary public, at the law office of A. W. Walker, one of plaintiff's attorneys, in the City of Fayette, at 10 o'clock in the forenoon of March 4, 1907, and then and there to testify as a witness in this cause.

"Said deputy sheriff appeared very much agitated at the time he was delivering said papers to me and it was

apparent that he had been under instructions of plaintiff and her counsel waiting for a signal from one of those present directing the delivery to me of said papers. I then learned that Mr. Scarritt was an attorney of Kansas City, Missouri, a member of the law firm of Scarritt, Scarritt & Jones, with offices in the American Bank Building in Kansas City, Missouri, is a relative of plaintiff, and that he had been consulted as counsel prior to my arrival in Fayette; that he had come to Fayette on this business and that the petition in this cause had been prepared prior to my arrival in Fayette, and that said petition had been filed in the Circuit Court of Howard County at Fayette prior to the time of my conversation aforesaid with said Scarritt in the hotel.

"Before leaving Fayette I made written demand on plaintiff for leave to examine the body of said A. F. Davis and was referred by plaintiff to said Dr. Givens for her answer, and said Dr. Givens, on behalf of plaintiff, refused to permit said examination of said body to be made. Finding that plaintiff's invitation to me to visit Fayette had been merely a ruse to get some person into Missouri who plaintiff could pretend was an agent of defendant for the purpose of receiving service of process, I immediately telegraphed to Dr. Shaw of Chicago cancelling my arrangements with him and left Fayette.

"At none of the times aforesaid did I have any authority to employ counsel on behalf of the defendant, and after said summons and said notice to take depositions and said subpoena were delivered to me as aforesaid the company directed me to turn the papers over to Mr. J. C. Rosenberger, attorney at law, New York Life Building, Kansas City, Missouri, which, on the following day, February 28, 1907, I accordingly did and immediately returned to my home in Chicago. I never had, nor did I assume, any authority to employ Mr. Rosenberger as counsel. That matter was left by me to the company to dispose of as it saw fit; nor did I see Mr. Rosenberger until after I had been specifically directed to do so by the defendant.

"I have seen the pretended return of the sheriff of Howard County, Missouri, upon the writ of summons in this cause. It is not true that I am or ever have been the agent of the above named defendant, or that I have ever represented it in any way except in the limited and special manner hereinabove set forth. My entire connection

with the case is as hereinabove set forth. I have never adjusted or settled a loss on any policy of insurance for defendant or aided or assisted in so doing in the State of Missouri. I came into the State of Missouri solely under the circumstances hereinabove set forth and for no other purpose.

FRANK G. MASON,

"Subscribed and sworn to before me, a notary public, within and for the County of Cook, State of Illinois, on this, the 22nd day of March, 1907. My commission expires Nov. 16, 1907. Geo. H. Mason, Notary Public."

AFFIDAVIT OF H. B. MEININGER.

"*County of Philadelphia, State of Pennsylvania, ss.*

"Horace B. Meininger, of lawful age, being duly sworn, on oath says: I am and have been since January 1, 1903, secretary and general manager of the above-named defendant. I reside at Philadelphia in said county and state. As such secretary I have had and still have charge of the books, records and correspondence of the defendant, passing upon applications for insurance and paying or adjusting claims under policies issued by the defendant, all subject to the approval and direction of the board of directors of defendant, and am familiar with all departments of its business and operations. The chief office of defendant is located in the said County of Philadelphia in said state.

"Defendant was incorporated under the laws of the State of Pennsylvania November 7, 1888, for the purpose, as expressed in its by-laws, of collecting and accumulating a fund for the mutual benefit and protection of its members out of which should be paid to them or the beneficiaries named by them such indemnity in case of their injury or death through external, violent and accidental means, or sickness, as should be provided and designated in their respective certificates of membership, and also the expenses of conducting the business of the company.

"Defendant has never issued or delivered within the State of Missouri a contract of insurance to any person.

"Defendant has never had any office or place of business or any property in the State of Missouri.

"No person has within the State of Missouri, at

any time, to my knowledge, receipted for any money on account of or for any contract of insurance made by such person for defendant, and no person to my knowledge has ever receipted within the State of Missouri for any money from other persons for transmission to defendant.

"No person has ever been appointed to act as agent for this defendant within the State of Missouri, nor has any person acted as such agent for defendant within the State of Missouri, and no person has within the State of Missouri as such agent solicited applications, delivered policies, or renewal receipts, or collected premiums thereon or received or collected moneys from any source or on any account whatsoever as such agent for defendant within the State of Missouri.

"Accordingly, by reason of the premises, defendant has never had occasion to apply to the proper officer of the State of Missouri for authority to transact business in said state, and defendant company has never been authorized or licensed to transact business in the State of Missouri, nor has defendant ever appointed the superintendent of insurance of the State of Missouri or any other person to receive or accept service of process within the State of Missouri.

"Defendant has at this time upwards of 5,913 members holding certificates of insurance, and out of the whole number of such members only 21 reside in the State of Missouri. The 21 certificates of insurance held by citizens of Missouri were in the main issued more than four years ago and some as long as ten years ago. The instances in which this defendant has issued certificates of insurance to residents of the State of Missouri are few and sporadic, and while this defendant has not refused applications for insurance made by citizens of Missouri, it has made no special effort to induce such persons to become members, and such certificates as have been issued by defendant to such persons residing in the State of Missouri have been the result largely of the good will and reputation of this defendant and not through any systematic solicitation by this defendant, and although this defendant does a large and extensive business, frequently as long as six months elapse without any applications for insurance being received from any resident of the State of Missouri. In every instance in which this defendant has issued certificates of insurance to residents of Mis-

souri, the persons insured have applied for such insurance in writing sent through the mails from Missouri to defendant at its home office in Philadelphia, Pennsylvania, and in each of said instances said applications have been acted upon at Philadelphia, and when accepted the respective certificates of membership were made out in Philadelphia and sent through the mails from Philadelphia to Missouri without the intervention in Missouri of any person in the service of defendant. Each and all of said transactions were transacted wholly by correspondence through the mails and in each of said instances membership fees, premium calls or assessments were paid to defendant at Philadelphia, where the same were received by defendant through the mails, and the same is true, with respect to the policy issued to said A. F. Davis, the insured in this case. None of the directors, officers or agents of the defendant reside in Missouri and defendant has never adjusted or paid any claims under its certificates in Missouri through any officer, agent or representative. The application for membership made to defendant by said A. F. Davis is hereto attached, marked Exhibit "A." A form of the insurance contract issued to said A. F. Davis by defendant is hereto attached marked Exhibit "B," the same being complete with the exception of dates. names and signatures.

"My attention has been called to the return of serice made by George D. Gibson, Sheriff of Howard County, Missouri, of the summons in said case. It is not true that Frank G. Mason, mentioned in said return as agent of said defendant is or ever was in any true or legal sense the agent of defendant, and it is not true that said sheriff delivered said summons to him while he was adjusting or settling a loss on any policy issued by defendant, or while he was aiding or assisting in so doing. The facts in this matter are these:

"On or about January 9, 1907, the defendant received from plaintiff herein a letter dated January 7, 1907, in words and figures as follows, to-wit:

" 'Fayette Mo. Jany. 7, 1907 Commercial Accident Insurance Co., Philadelphia, Pa. Gentlemen:—Mr. A. F. Davis was accidently shot on the 31st of December, 1906, and died on the 4th day of Jany. 1907 as the result of it.

I find that he held a policy in your company for $5000.00, Number 16048.

Please send proofs of death to be executed, and oblige. Yours very truly,

M. H. Davis.'

"On or about January 10, 1907, I, on behalf of defendant, directed Dr. Frank G. Mason of Chicago, Illinois, to go to Fayette, Missouri, the home of plaintiff, and there make investigation into the death of said A. F. Davis and cause thereof, and to report the result of such investigation to the company. Said Mason was given no authority to settle or compromise or pay plaintiff's claim. On or about January 17, 1907, I was informed by Dr. Mason that he had found it necessary, in order to make proper investigation, to ask plaintiff or her representatives for leave to examine the body of the deceased; that he had made due request for said leave and that said leave had been refused. On or about January 28, 1907, the company received the following letter from plaintiff:

" 'Fayette, Missouri, Jany. 26, 1907. The Commercial Accident Ins. Co., Philadelphia, Pa., Gentlemen:—

I have not yet received the proofs of death blanks from you for which I wrote about the 8th of Jany. Every other company has sent them and they have all been filled out and returned to them and a good many claims already paid. The policy Number is 16048, and the Assured is Arthur F. Davis. Please send the proofs at once and oblige, Yours very truly,

Mrs. Mary B. Davis,

per M. H. D.'

"On January 28, 1907, I, on behalf of the company, addressed and sent the following letter to the plaintiff herein:

" "Philadelphia, Pa., Jan. 28th, 1907. Mrs. Mary B. Davis, Fayette, Missouri, Dear Madam:—We do not see our way clear to give the matter of your husband's death consideration under policy AA16048 until you grant us permission and give us an opportunity to examine the body of the deceased, as required by the contract. We have decided that such examination is necessary in order to properly determine the exact cause of death. Very truly yours, Horace B. Meininger, Secretary.'

"On or about February 3, 1907, the defendant received the following letter from the plaintiff:

" 'Fayette, Missouri, Jany. 31, 1907.
Commercial Mutual Accident Ins. Co., Philadelphia, Pa.
Gentlemen:—

In reply to your favor of the 28th regarding payment of claim under Policy No. AA16048, will say that if there was any doubt or question whatever about the cause of the death of the assured you might have some ground for wanting an autopsy held now, but since there is none and it is a clear case of accidental death and as there was a Post Mortem held by three of the most reputable doctors here and they were perfectly satisfied that death was due to accidental injury, I think your demands are entirely uncalled for.

The testimony of these doctors in court will surely offset that clause in the policy, and I must ask that you send the necessary proofs of death at once or I shall have the proofs executed and sent you as a matter of record for future use. Yours very truly, Mrs. Mary B. Davis, Per M. H. Davis.'

"On or about February 6, 1907, I, on behalf of the defendant, addressed and sent to the plaintiff, the following letter:

" 'Philadelphia, February 6th, 1907.

" 'Mrs. Mary B. Davis, Fayette, Mo., Dear Madam: In response to your letter of January 31, 1907, we again renew our request—which you have now twice refused—that the medical officer of the company be permitted to examine the body of A. F. Davis for whose death you make claim. If you again decline to permit such an examination to be made, this company will reject any claim made under the policy; one of the essential provisions of the policy having been violated.

We shall not submit any claim blanks in this matter until this examination has been allowed.

Will you kindly notify us immediately what you propose to do? Very truly yours,
Horace B. Meininger, Secretary.'

"I also, on February 6, 1907, addressed and sent to Murray H. Davis, son of plaintiff, the following letter:

" 'Philadelphia, February 6, 1907. Mr. Murray H. Davis c/o Farmers & Merchants Bank, Fayette, Mo., Dear Sir: We are enclosing herewith for your information a copy of a letter this day addressed to your mother, Mrs. Mary B. Davis, regarding the permission to make an examination of the body of your father. It is forwarded simply that you may be informed concerning the matter. Very truly yours, Horace B. Meininger, Secretary.'

"The company received no reply from plaintiff until on or about February 22, 1907, upon which date defendant received from plaintiff the following letter dated February 20, 1907:

" 'Fayette, Missouri, February 20, 1907.

" 'Commercial Mutual Accident Insurance Co.,
Philadelphia, Pa.

" 'Gentlemen:—In reply to your favor of the 6th will say that I am very sorry that you still insist on having some one examine the body of my deceased husband, as I hoped you would be satisfied with the examination of these doctors here as they are physicians of high standing and fully competent to hold such an examination.

" **'However, if you think it is right you may send some one here to examine the body for you. Can't you also send some one authorized who could settle the claim here if your doctor found everything as reported, as most all of the claims have been paid and I am very anxious to have the balance settled as soon as possible.**

" **'Then, too, if I should want to compromise the claim in lieu of an examination, your agent would have power to settle it without any delay. Please let me know just when you will send some one, as I am thinking of going to St. Louis for a few days and would like to be here when he comes, so let me know several days in advance.**

Yours very truly,
Mrs. Mary B. Davis.'

"Believing that plaintiff was acting in good faith in her statement made in the last quoted letter that she would permit the defendant or some one on defendant's behalf to examine the body of the deceased, and that she in good faith desired to discuss the matter of compro-

mise, I addressed and sent a letter to her under date of February 22, 1907, as follows:

"Philadelphia, February 22, 1907.

"'Mrs. Mary B. Davis, Fayette, Mo., Dear Madam:—Your letter of February 20th has been received. We shall immediately arrange to have our medical representative in Fayette as soon as possible. He will have authority to make an adjustment, should that course be advisable.

Very truly yours,
Horace B. Meininger, Secretary.'

"And thereupon I immediately directed said Mason to return to Fayette and gave him as evidence of his authority a letter in words and figures as follows, addressed to the plaintiff:

"'Philadelphia, February 22, 1907.

"'Mrs. Mary B. Davis, Fayette, Mo., Dear Madam: The bearer, Dr. Frank G. Mason, is fully authorized to act on behalf of this company in relation to a post mortem examination on the body of your late husband, Mr. Arthur F. Davis, and is also authorized to adjust the claim.

Very truly yours,
Horace B. Meininger, Secretary.'

"Said authority given as aforesaid to said Mason to compromise plaintiff's claim was given to him by me on behalf of defendant solely by reason of the suggestion and request of the plaintiff made in her above quoted letter of February 20, 1907, and said Mason was asked to return to Fayette solely by reason of the invitation expressed in said letter and the assurances therein set forth. Said Mason had no authority whatsoever to settle or compromise plaintiff's claim until such authority was conferred on him by defendant at the request of plaintiff made in her above quoted letter of February 20, 1907. I did not know or have any intimation that said letter was intended merely as a means for luring defendant into sending some person into the State of Missouri with a view to attempting to serve such person with process.

"Upon being advised by said Mason that upon his arrival at Fayette, Missouri, the summons in this cause and other papers in connection with this suit had been

delivered to him by the sheriff of Howard County, Missouri, I immediately directed him to deliver said papers to J. C. Rosenberger, attorney at law, New York Life Building, Kansas City, Missouri.

"I have known Dr. Frank G. Mason for a number of years. He is a practicing physician and surgeon at Chicago, Illinois, and is in general practice there. He has never had any contract of employment with defendant and is not and never has been employed on any salary by it. He has not and never had had any connection with this company except that he has made from time to time, when specially requested so to do, medical examinations of persons insured by defendant and reports thereon. Defendant has not had frequent occasion to call upon him for any services. When asked to perform services for us he is and always has been free to accept or decline the engagement as he sees fit. He is and always has been paid in each case for what his services are reasonably worth, each case being treated as a separate and distinct transaction. Said Mason has never paid or adjusted or settled within the State of Missouri any loss on any contract of insurance made by defendant, nor has he ever assisted in so doing. And further affiant saith not.

HORACE B. MEININGER.

"Subscribed and sworn to before me, a notary public within and for the County of Philadelphia, State of Pennsylvania, on this the 22nd day of March, 1907. My commission expires Jan. 15, 1909.

(Seal) PAUL O. KUSHMAN,
Notary Public."

Attached to Mr. Meininger's affidavit are a copy of the form of policy issued to the deceased insured, and a copy of his application for the policy (30).

The account of the matter given in the foregoing affidavits stands in every material respect undisputed. On the hearing of the motion to set aside the service plaintiff read in evidence against said motion sundry depositions (31-81). Plaintiff, Mary B. Davis, in her deposition, examined by counsel for defendant, admitted that Dr. Mason had on his first visit to Fayette on January 14th or 15th, requested an autopsy and that she had

refused it (35); that she had received defendant's above quoted letter of February 6th, 1907, wherein it renewed the request for an autopsy; that she had referred said letter to her attorney, Mr. W. C. Scarritt, of Kansas City, Missouri, with whom she had been in correspondence in regard to her claim and who was advising her how to proceed (36-37) and that she had also been consulting with her son, Murray H. Davis, who was also acting for her (36-37); admitted that she authorized the above quoted letter of February 20th, 1907, wherein she had asked the company to send somebody to Fayette on its behalf (38), but on being asked if that letter was written at the suggestion of her lawyer, refused, on advice of counsel, to answer (42, 43). She also testified that she had in fact intended to go to St. Louis as stated in that letter, but admitted she had not gone there, and on being asked when she had intended to visit St. Louis, she, on advice of counsel, refused to answer (39).

Murray H. Davis, a son of plaintiff, testified that he was a bank cashier in Fayette, admitted that he had written for plaintiff said letter of February 20th, 1907 (44), and that he had sent the telegram to Dr. Mason of February 25, 1907, asking him to come to Fayette on Wednesday, February 27th (45); that witness had been advising with Mr. Scarritt ever since February 6th in regard to the matter (45); that he had thought from the beginning that it would be necessary to sue defendant (45); admitted that Mr. Scarritt had come to Fayette from Kansas City early on Wednesday, February 27th on the same train on which Dr. Mason arrived (46); asked why he had asked Dr. Mason to defer his visit until Wednesday, February 27th, instead of Tuesday, February 26th, the latter date having been by Dr. Mason suggested, witness on advice of counsel refused to answer (46); that witness met Dr. Mason at the hotel, that witness first inquired of Dr. Mason if he was an agent of the company with power to settle the claim, and upon receiving an affirmative reply witness asked him if

he would prefer to compromise rather than make the autopsy (47) and that discussion of compromise ensued, the talk being between Dr. Mason and Mr. Scarritt (48); that witness had requested an offer of compromise (51); that while they were talking at the hotel a deputy sheriff walked in and delivered the suit papers to Dr. Mason; that the suit had been filed a few minutes before, that the papers were served on Dr. Mason at about 10:30 or 11 o'clock a. m., and that Mr. Scarritt left Fayette for Kansas City at 11:00 o'clock the same morning (49,.50).

A. W. Walker, attorney at law, Fayette, Missouri, in his deposition testified that he was one of plaintiff's attorneys (72); that plaintiff's son, the witness Murray H. Davis, had shown witness plaintiff's petition in this suit **on the day before Dr. Mason's arrival** (72); that while Murray H. Davis, Mr. Scarritt and Dr. Givens were talking at the hotel on February 27th, witness was attending to filing the suit, getting the sheriff, etc. (72-74); that witness's instructions were to file suit if they did not get together on a settlement (73); that at the time he filed the suit he did not know whether any settlement had been arrived at or not (73); that while the parties were talking in the hotel witness and a deputy sheriff were in the hotel barber snop **waiting to be called in** with the papers ready to serve (74); that at the time the summons was delivered by the deputy to Dr. Mason, the latter was also handed a notice that depositions would be taken and with a subpoena to appear thereat (74).

Mr. W. C. Scarritt, one of plaintiff's attorneys, admitted in his deposition that he had prepared the petition in this suit a day or two before it was filed on February 27th (75); that he had been advising M. H. Davis by correspondence, but declined to state the contents of his communications (75); that he arrived in Fayette at 6:35 a. m. on February 27th, 1907, and left at 11 a. m. the same day; that he had participated in the discussion

at the hotel and that the other witnesses had correctly stated what transpired there (77).

As indicated above, this suit was filed on February 27th, 1907, in the Circuit Court of Howard County, Missouri (5). In her petition (5-6) the plaintiff seeks to recover the sum of $5,000 under a policy of accident insurance alleged to have been issued by defendant to her deceased husband. Writ of summoms was issued forthwith (6) out of said State Court directing the sheriff of said county to summon the defendant to appear in said court on the first Monday in April, 1907 (6).

The only attempt which was made by the sheriff to serve said writ of summons was by delivering a copy thereof under the circumstances above set forth to Frank G. Mason. The sheriff's return (7) is as follows:

SHERIFF'S RETURN.

"Executed the within writ in the county of Howard and State of Missouri, on the 27th day of February, A. D., 1907, by dellivering a copy of the petition in this case hereto atttached and a copy of this writ to Frank G. Mason, agent of the within named defendant, the Commercial Mutual Accident Company, a corporation organized under the laws of the State of Pennsylvania, and doing business in this State, but having no office or place of business herein, and not incorporated under the laws of this State nor authorized to do bussiness in this State, and while he, the said agent, was transacting business for the said defendant in our said county, and while he was adjusting or settling a loss on a policy of insurance for said defendant or was aiding and assisting in so doing.

Geo. D. Gibson,
Sheriff Howard County, Mo.
Fee $1.00 By H. L. Hughes, *Deputy.*"

The local statutes prescribing the manner in which process shall be served upon foreign insurance companies

are Sections 7991 and 7992 of the Revised Statutes of Missouri for 1899, and are as follows:

"Sec. 7991. *Process Against Foreign Companies, Appointment of Superintendent to Receive or Accept Service Of.*—Any insurance company not incorporated by or organized under the laws of this state, desiring to transact any business by any agent or agents in this state, shall first file with the superintendent of the insurance department a written instrument or power of attorney, duly signed and sealed, appointing and authorizing said superintendent to acknowledge or receive service of process issued from any court of record, justice of the peace, or other inferior court, and upon whom such process may be served for and in behalf of such company, in all proceedings that may be instituted against such company, in any court of this state or in any court of the United States in this state, and consenting that service of process upon said superintendent shall be taken and held to be as valid as if served upon the company, according to the laws of this or any other state. Service of process as aforesaid, issued by any such court, as aforesaid, upon the superintendent, shall be valid and binding, and be deemed personal service upon such company, so long as it shall have any policies or liabilities outstanding in this state, although such company may have withdrawn, been excluded from or ceased to do business in this state, and in case such process is issued by a justice of the peace or other inferior court, the same be directed to and served by any officer authorized to serve process in the city or county where said superintendent shall have his office, at least fifteen days before the return day thereof, and such service shall confer jurisdiction. Every such instrument of appointment executed by such company shall be attested by the seal of such company, and shall recite the whole of this section, and shall be accompanied by a copy of a resolution of the board of directors or trustees of such company similarly attested, showing that the president and secretary, or other chief officers of such company, are authorized to execute such instrument in behalf of the company; and if any such company shall fail, neglect or refuse to

appoint and maintain, within the state, an attorney or agent, in the manner hereinbefore described, it shall forfeit the right to do or continue business in this state."

Sec. 7992. *Additional Service.*—Service or summons in any action against an insurance company, not incorporated under and by virtue of the laws of this state, and not authorized to do business in this state by the superintendent of insurance, shall, in addition to the mode prescribed in Section 7991, be valid and legal and of the same force and effect as personal service on a private individual, if made by delivering a copy of the summons and complaint to any person within this state who shall solicit insurance on behalf of any such insurance corporation, or make any contract of insurance, or collects or receives any premium for insurance, or who adjusts or settles a loss or pays the same for such insurance corporation, or in any manner aids or assists in doing either."

It will be observed from the sheriff's return that service was attempted in this case under the provisions of Section 7992, above set out, but under the facts as above set forth, serious question exists as to whether the return on its face, and even if regarded as true, shows a valid service even under said statute, or even if said statute were controlling upon the national courts, a question which will be hereinafter discussed.

Before the return day of the summons, namely, on March 1, 1907, the defendant filed in said State Court its petition and bond for the removal (79) of this cause into the Circuit Court of the United States for the Central Division of the Western District of Missouri, in which Howard County is located, and on March 9, 1907, the defendant caused to be filed in said Court of the United States the transcript (4) of the clerk of the Howard County Circuit Court of the record and proceedings in this cause in said court, and on the same day, and at the same time, namely, on March 9, 1907, the defendant filed in said Federal Court its motion to quash and set

aside the said return of the sheriff of Howard County. The motion recites that the defendant appears "specially for the purposes of this motion only, not admitting, but on the contrary denying that this court has or can have any jurisdiction over this defendant, and moves the court to quash the pretended return to the writ of summons in this cause made by the sheriff of Howard County, Missouri, because, etc." (16).

The record entry showing the filing of said motion is shown on page 4 and the motion itself is set forth in the Bill of Exceptions on pages 16 and 17 of the record.

The next ensuing term of the said Circuit Court of the United States opened on March 18, 1907 (4), and on the next day, March 19th, there was filed in said court a stipulation between the parties plaintiff and defendant (3), for a transfer of this cause to the Western Division of the Western District of Missouri, and that the original record and papers therein might be sent by the clerk of said court to said clerk of the court to which the cause was transferred. Said stipulation, however, contained the following provision: "This stipulation shall not be deemed an entry of appearance by defendant, nor any waiver by defendant of any right to object to the jurisdiction of the court, or to the service of process herein."

Pursuant to the filing of said stipulation and on the same day an order was made (4), "that this cause be transferred to the Circuit Court of the United States for the Western Division of the Western District of Missouri at Kansas City, Missouri, and that the clerk of this court forward to the clerk of said court the files in this cause and a certified transcript of the orders and record entries herein."

On March 25th, 1907, the clerk for the Central Division filed with the clerk for the Western Division of said Court of the United States the said transcript from the Howard County Circuit Court, together with

the files in this cause, including said stipulation and said motion to quash the return of said sheriff (2-3).

On April 29th, 1907, defendant filed in the court below its amended motion to quash and set aside the sheriff's return and said motion is set out on pages 17 and 18.

On the same day said amended motion came on to be heard (10-18), and on the hearing thereof, the defendant offered in evidence the above quoted affidavits of Frank G. Mason and H. B. Meininger (18).

The plaintiff on her part offered in evidence in opposition to said motion two depositions taken at her instance at Fayette, Missouri, on March 4th, 1907, and April 4th, 1907, respectively, of H. S. Massey, an operator for the Western Union Telegraph Company at Fayette, who was called to identify certain telegraphic correspondence between Dr. Mason and the defendant during his visit at Fayette on February 27th, and which depositions are set out on pages 31 to 33. Plaintiff also offered in evidence against the motion the depositions of Mary B. Davis, Murray H. Davis, Dr. Givens, A. W. Walker, W. C. Scarritt and J. C. Rosenberger, including the notices upon which same were taken. Said depositions are set out on pages 33 to 81. The substance of the evidence therein contained has already been set forth.

All of said depositions except those of the witnesses H. S. Massey and J. C. Rosenberger, were taken at the instance of the defendant. The defendant did not appear at the taking of the deposition of Massey, nor at the taking of the deposition of J. C. Rosenberger, the latter being counsel for defendant and having been in attendance at said deposition solely in obedience to a subpoena served upon him as shown by the deposition (79-81).

In view of the fact that it has been argued by plaintiff that defendant by taking depositions in support of its motion to set aside the sheriff's return waived its objec-

tions to the jurisdiction, we deem it necessary to call attention to the notice pursuant to which said depositions were taken (33-34), also to the statements of defendant's counsel made at the time the depositions were taken (34-35, 69, 71).

The court will observe that in the notice to take said depositions plaintiff was notified that same were to be read in evidence by defendant "solely in support of its motion to quash or set aside the return of service in said cause * * * defendant appearing solely for said purposes and without waiving any of its objections, to the return of said service or to the jurisdiction of said courts" (33), and that defendant by its counsel at the taking of said depositions expressly refused to examine or cross examine any of the witnesses with respect to the merits of the cause of action set out in her petition, and that defendant limited its examination strictly to the matters involved in the motion to quash the sheriff's return (34-35, 69, 71).

The court having on April 29th heard the evidence on said amended motion to quash the sheriff's return, took the same under advisement (10) and on the next day, April 30th, 1907, made an order overruling and denying said motion, to which action of the court defendant was allowed an exception, and leave was granted defendant to file bill of exceptions within thirty days and to file answer or demurrer within ten days (10).

Afterwards, on May 2nd, 1907, defendant filed its bill of exceptions wherein it embodied its original motion and its amended motion to quash and set aside the sheriff's return, and also all the proofs offered for or against the same. Said bill of exceptions is set out on pages 15 to 81 of the record.

In overruling said motion the court filed no opinion (see Judge's certificate, certifying cause to this court, 14).

Upon the overruling of its motion to set aside the sheriff's return the defendant stood upon the same and

failed to appear or defend further, and on May 13, 1907, the court entered a default judgment (14), in the cause, finding the issues in favor of the plaintiff and against the defendant and adjudging that plaintiff have and recover of and from the defendant the sum of $5,062.50, with interest and costs, and awarding execution therefor (11), and it is from this judgment that defendant prosecutes this writ of error.

In our petition for writ of error the following occurs (14):

> "Said writ of error is sued out to review solely the question as to whether the said Circuit Court had right, power or jurisdiction to enter the said judgment,—that is to say, the question as to whether said Circuit Court had such jurisdiction over the person of defendant as to authorize the rendition of the judgment aforesaid."

And in allowing said writ of error the court below in its order provided (12):

> "Said writ of error is allowed in order that the said Supreme Court may review the single and definite question as to whether there has been such service of process upon the defendant in this cause as to confer upon the Circuit Court the right, power and jurisdiction to render judgment against defendant,—that is to say, the question as to whether the Circuit Court erred in overruling defendant's amended motion to set aside the return of service made by the sheriff of Howard County, Missouri, to the writ of summons in this cause and in thereafter taking and exercising jurisdiction in this cause."

The court also in substance included the same statement in its formal certificate (14) sending the cause to this court and which is hereinabove set forth. The assignment of errors will be found on page 12.

SPECIFICATIONS OF ERROR.

I. The court erred in overruling defendant's amended motion to quash and set aside the return of service made by the sheriff of Howard County, Missouri, to the writ of summons in this cause and to dismiss this cause for want of jurisdiction and in conceiving that it had jurisdiction to enter a judgment against defendant and in exercising such jurisdiction for that (*a*) Frank G. Mason, the person upon whom said summons was attempted to be served, was not a person authorized to receive service of process on defendant's behalf; (*b*) at the time said attempted service was made defendant was not engaged in the transaction of business in this state so as to be amenable to this suit or to process therein; (*c*) said Frank G. Mason was lured or enticed into the State of Missouri by a trick and device conceived and executed by plaintiff; (*d*) the pretended return of service does not disclose a valid service either under the laws of the United States or of the State of Missouri.

II. The court erred in entering final judgment against plaintiff in error in favor of plaintiff below and this for all the reasons set forth in the foregoing specification.

BRIEF OF THE ARGUMENT.

I.

In order to support the jurisdiction of the court to render a personal judgment against a foreign corporation, these facts are essential: (1) That at the time of service of the summons the corporation was engaged in business in the state. (2) That the person upon whom service was had stood in a representative character to the company, that his employment was general, not special, and that his duties were not limited to those of a subordinate employe nor *to a particular transaction,* and (3) that such person was not lured or enticed into the state, or authority conferred upon him through any trick or device employed by the plaintiff.

St. Clair v. *Cox,* 106 U. S., 350;
Frawley v. *Penn. Casualty Co.,* 124 Fed., 259;
Goldey v. *Morning News,* 156 U. S., 522;
Conn. Mut. Life Ins. Co. v. *Spratley,* 172 U. S., 602;
Barrow S. S. Co. v. *Kane,* 170 U. S., 100;
Conley v. *Alkali Works,* 190 U. S., 406;
Geer v. *Alkali Works,* 190 U. S., 428;
Remington v. *R. R.,* 198 U. S., 95.

II.

The defendant was and is not doing business in this state. Isolated or sporadic transactions, taking place between a foreign corporation and citizens of a state are not a doing or carrying on of business within that state, even where the transaction is of such a character as to constitute a part of the ordinary business of the corporation.

Cooper Mfg. Co. v. *Ferguson,* 113 U. S., *727*;
Frawley v. *Ins. Co.,* 124 Fed., l. c. 264, and many cases both State and Federal there cited:

Louden Machinery Co. v. *Amer. Malleable Iron Co.*, 127 Fed., 1008;
Romaine v. *Ins. Co.*, 55 Fed., 751;
Hazeltine v. *Ins. Co.*, 55 Fed., 743;
St. Louis Wire Mill Co. v. *Cons. Barb Wire Co.*, 32 Fed., 802;
U. S. v. *Telephone Co.*, 29 Fed., 37-41;
Carpenter v. *Air Brake Co.*, 32 Fed., 434;
19 Cyc., 1268, Ti. Foreign Corporations.

III.

Much more so is this true where, as in this case, the business transacted was wholly by mail, where policies of insurance are negotiated by correspondence with the company, and not through the medium of agents located in the state or going into it for that purpose and the business, whatever it was, was done at the home office in a foreign state, where the applications were received and passed upon, the payment of premiums made and the policies written and forwarded; this does not constitute a doing of business in the state.

Allgeyer v. *Louisiana*, 165 U. S., 578;
Marine Ins. Co. v. *St. L. Ry. Co.*, 41 Fed., 643;
Hazeltine v. *Ins. Co.*, 55 Fed., 743;
Romaine v. *Ins. Co.*, 55 Fed., 751;
Caesar v. *Cahill*, 83 Fed., 403;
East Bldg. & Loan v. *Bedford*, 88 Fed., 7;
Neal v. *New O. Assn.*, 100 Tenn., 607;
Frawley v. *Penna. Cas. Co.*, 124 Fed., 259.

IV.

The case of *Pa. Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S., 407, in which the service was held good, is plainly distinguishable from the case at bar on the following grounds: (1) There, nearly one third of the amount of the company's total fire risks of nearly a million dollars were located in New York where the service of the writ was had; the solicitation of business in New York was

not sporadic or isolated but systematic and persistent; the subject of the insurance was real estate in New York; the policies, in effect, provided for an adjustment of losses in New York; three of the company's directors were residents of New York, there was evidence of the company's agents coming into New York and addressing conventions to induce the taking out of its policies and service was made upon a *"resident director,"* while here none of these facts exist—out of a total of 5,913 members only 21 reside in Missouri, and these became such, *sporadically,* during a period of more than ten years, wholly as the result of correspondence, without solicitation by defendant and there was no policy provision providing for local adjustment of losses. (See Meininger's affidavit pp. 24-31.) In the Meyer case the service was made upon a resident director in accordance with a local statute expressly authorizing such service, while here the service was upon a physician specially employed for this single transaction to investigate the loss, without salary or permanent employment, with no authority to compromise the claim until such authority was conferred on him at the express request of plaintiff and who came into the state at plaintiff's invitation and found the sheriff at plaintiff's direction lying in wait for him with this summons.

V.

Nor is there anything in *Spratley* v. *Ins. Co.,* 172 U. S., 602, which would support the service attempted in this case. In that case the person served had for over eighteen years been *a regular salaried officer* of the company whose duties were *not limited to any particular transaction,* but whose employment was *general* in its scope under a contract which gave the company his "entire time and services except upon leave of absence." The court lays stress on these facts as witnessed by the following extracts from the opinion:

"We have * * * his general authority, not limited to a particular transaction. On the contrary, as seen from his written appointment, his agency for the company was a *continuous* one, and had been since 1887" (p. 116). Also on p. 612: "Why was he not such an agent as it would be proper to serve process upon? He had been appointed as agent by the company; his *whole time and services* were given to the company under an appointment made years previously; he received a *salary, not dependent* upon any *particular* service at any *particular* time. * * * He was not a mere agent appointed *for each particular case.* He was employed *generally* by the company to act in its behalf in all cases of this kind and as directed by the company in each case." Again on page 618: "He was *no mere special employee* engaged by the company for this particular purpose."

In the case at bar the person to whom the writ was delivered had none of the attributes which the agent in that case had. He was a physician in general practice of his profession, employed not on salary by defendant or anyone else, but especially in this particular case, without any continuity or regularity of service, not as adjuster but as medical examiner, owing no duty with respect to the transmission of legal process. Moreover such authority to adjust the loss as he had in this one case was conferred on him as the result of the device or scheme of plaintiff in requesting that he be given such authority in order that it might be pretended that he was authorized to receive service of process. (See plaintiff's letter (28) to defendant of February 20, 1907.) The Spratley case lacked the element of deception and enticement which exists here. (2) Equally important is the fact that in the Spratley case the company was actually doing business in the state; for twenty-four years it had been regularly licensed to do business there and its power of attorney to the superintendent of insurance was on file to accept service of process, and during this time the policy there in suit had been solicited and is-

sued through a local agent; afterward the company assumed to withdraw from the state, recalling its agents, but it continued to collect premiums on outstanding policies. Under these and other circumstances stated in the opinion it was held that the company was doing business in the state.

VI.

Where the agency of the person served is casual or temporary or confined to a particular purpose, he cannot be held, in law, an agent to receive service of process on behalf of the corporation.

St. Clair v. *Cox*, 106 U. S., 350;
Conn. Mut. Life Ins. Co. v. *Spratley*, 172 U. S., 602;
Louden Mach. Co. v. *Amer. Iron Co.*, 127 Fed., 1008, per McPherson, J., disapproving *Houston* v. *Filer Co.*, 85 Fed., 757;
Mex. Central Ry. v. *Pinkney*, 149 U. S., 194;
Maxwell v. *R. R.*, 34 Fed., 286;
Frawley v. *Pa. Casualty Co.*, 124 Fed., 265;
Wall v. *C. & O. Ry. Co.*, 95 Fed., 398.

VII.

If a person is induced by artifice to come within the jurisdiction of a court for the purpose of having process served upon him and process is there served, it is such an abuse that the court will, on motion, set the process aside.

Fitzgerald Const. Co. v. *Fitzgerald*, 137 U. S., 98;
Frawley v. *Penna. Casualty Co.*, 124 Fed., 259;
Louden Mach. Co. v. *Amer. Iron Co.*, 127 Fed., 1008;
Cavanaugh v. *Manhattan Transit Co.*, 133 Fed., 818.

The case of *Frawley* v. *Penna. Cas. Co., supra,* presents almost an identical state of facts as is disclosed in the case at bar.

VIII.

Nor does the sheriff's return even show a valid service under the local statute under which it was attempted to be made. That statute (Sec. 7992 R. S. Mo., 1899) provides that service may be made upon any person "who adjusts or settles a loss or pays the same for such insurance corporation, or in any manner aids or assists in doing either." It is not pretended that Dr. Mason ever adjusted or settled or paid any loss whatever in the State of Missouri, certainly not the loss in suit which has never been paid. Nor is it pretended that he ever had the remotest connection with any Missouri loss except this one. This loss having never been adjusted, settled or paid, it cannot be truthfully said that he has in any manner "aided" or "assisted" in so doing.

The word "assist" necessarily means that the act attempted has been effected.

Hurst v. *State*, 79 Ala., 55, 57.

IX.

Moreover, the Federal Courts in determining their jurisdiction are not bound by any local statute or decision, but will determine on principles of general jurisprudence whether the company is doing business in the state and whether the person served is such an agent as is truly representative of the corporation.

St. Clair v. *Cox*, 106 U. S., 350;
Barrow Steamship Co. v. *Kane*, 170 U. S., 100;
Spratley v. *Ins. Co.*, 172 U. S., 602;
Frawley v. *Pa. Casualty Co.*, 124 Fed., 259, and cases cited.

X.

The return of service by an officer of a local court is not conclusive upon a court of the United States and its recitals may be contradicted, any state decision or statute to the contrary notwithstanding.

See authorities under Point IX.

XI.

The question of the validity of the service was properly raised by motion to set aside the service, supported by affidavits. This matter is elaborately discussed in *Wall* v. *Ry.*, 95 Fed., 398, and in *American Cereal Co.* v. *Pettijohn Co.*, 70 Fed., 276. Indeed this practice prevails generally in the Federal courts as will be seen from the following, among other cases: *Kendall* v. *Loom Co.*, 198 U. S., 477; *Remington* v. *R. R.*, 198 U. S., 95; *Peterson* v. *R. R.*, 205 U. S., 364; *Wabash Ry. Co.* v. *Brow*, 164 U. S., 271; *Goldey* v. *Morning News*, 156 U. S., 518; *Cavanaugh* v. *Manhattan Transit Co.*, 133 Fed., 818; *Andenried* v. *East Coast Milling Co.*, 124 Fed., 697; *Boardman* v. *McClure Co.*, 123 Fed., 614.

XII.

The defendant did not waive its objections to the service nor its right to contest the jurisdiction by taking depositions in support of its motion to quash the service.

Stonega Coal & Coke Co. v. *Louisville Co.*, 139 Fed., 271;

Pac. Mutual Life Ins. Co. v. *Tompkins*, 101 Fed., 539,

XIII.

This court has jurisdiction of this writ of error under Sec. 5 of the Act of March 3, 1891 (26 Stat. at L., 517; U. S. Comp. Stat., 1901, p. 549), which provides that an appeal shall be directly to this court "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." The question of the validity of the service of process involves the jurisdiction of the court below within the meaning of said section so as to sustain a direct appeal to this court.

Remington v. *R. R.*, 198 U. S., 95, and cases cited;

Board of Trade v. *Hammond Elevator Co.*, 198 U. S., 424.

ARGUMENT.

I.

It is perfectly apparent that the object and purpose of plaintiff's letter to the company, of February 20, was to get the company to send some one into the state with authority to settle the claim, and plaintiff having succeeded in this artifice will not be allowed to take advantage of it. It will be noted from the prior correspondence that the plaintiff had been persistently refusing to permit an examination of the body, and the court will note that even in her letter of February 20, how careful the plaintiff is to refrain from expressly assenting to such examination. Her language is "However, if you think it is right, you may send some one here to examine the body for you." In short, the letter was evidently framed to induce the belief on the part of the company that such examination would be assented to and at the same time give plaintiff the right to refuse if she saw fit. But plaintiff and her advisers saw that it would not do at all to attempt the service of process upon a mere medical examiner such as Dr. Mason, but apparently concluded that it was necessary for their purpose that some person come into the state for defendant with power to adjust the claim. Therefore, she wrote, "Can't you also send some one authorized who could settle the claim here, if your doctor found everything as reported." And she is careful to ask that the agent be given "power to settle it without any delay," in order that it might be pretended that such agent had this power and that he could settle it without having to refer it back to his company. She is also careful to ask that she be notified "several days in advance" of the coming of such person to Fayette. The palpable object of this was so that she might make all

the necessary arrangements for the springing of the trap. To dispose of any pretext that Dr. Mason at all times had authority to settle this claim, it is only necessary to invite scrutiny of this letter of February 20th. If Dr. Mason had authority to settle the claim, why should plaintiff, in that letter, ask that such authority be conferred upon him. As already indicated, she was not content to have the company send merely a doctor to examine the body, but wanted to get somebody into the state with power to adjust the claim so that she might be in a position to claim that such person was within one of the designated classes of persons mentioned in Section 7992 of the Missouri Statutes of 1899.

While the letter of February 20 is signed by the plaintiff its artfulness cannot be disguised. It is admitted that it was written by her son (38-39) who was looking after her affairs and who was advising with her attorneys (45). The same sort of a situation is presented by the case of *Frawley & Wilcox* v. *Penna. Casualty Co.*, 124 Fed., 259. In that case a firm of lawyers in Wisconsin had a bill against an insurance company for services, which bill was in dispute. The company had not been licensed to do business in the state, but as is the case here had a few policies outstanding which had been issued through correspondence. One of these policies was held by one of the plaintiffs. A local statute provided that valid service could be obtained upon unauthorized foreign companies by delivery of process upon any person receiving a premium on the company's behalf. A premium becoming due on the plaintiff's policy a notice to that effect was sent to him by the company. In response to this he wrote stating that he disliked to forward the money for renewal without getting a receipt for it at the time, and suggesting that if the company would send the receipt to the cashier of one of the local banks, he would pay such upon its delivery to him. The company not suspecting a trap, agreed to this suggestion and sent

the renewal receipt to the bank cashier suggested. A few hours afterwards and on the same day at the instance of one of the plaintiffs, summons was served on said cashier. Upon these facts the court said, l. c. 265:

> "But there is still another ground on which the service must be declared invalid. It was secured by a trick which the law will not countenance. The assumed reluctance of the plaintiff Wilcox to remit his money to the home office to pay for the renewal of his policy was made out of whole cloth. It was a mere pretense to entrap the company into doing something which, as he assumed, would make it liable to suit in the courts of Wisconsin for the disputed bill of the firm. If his position was correct, that the collection of his premium through Joyce was the transacting of business by the company within the state and made Joyce its agent, he thereby induced both the company and Joyce to violate the law of the state (Rev. St. Wis., 1898, 1978); and Joyce, in undertaking to act as agent without a license, to commit a misdemeanor (Id. 1976, 1977). But the company did not wittingly offend. Whatever was done was solely in response to the suggestion of Wilcox, and for his assumed security and accommodation, and it is therefore to be laid to his charge. Having enticed the company within reach of a summons in this way for the benefit of his firm—Mr. Bundy, another member of it, being also a party to the scheme—clearly the plaintiffs cannot retain the advantage thus fraudulently secured, to say nothing of the violation of law involved. It is said by Fuller, C. J., in *Fitzgerald Construction Company* v. *Fitzgerald*, 137 U. S., 98, 11 Sup. Ct., 36, 34 L. Ed., 608:
>
> 'If a person is induced by false representations to come within the jurisdiction of a court for the purpose of obtaining service of process upon him and process is there served, it is such an abuse that the court will, on motion, set the process aside.'
>
> The law is declared in the same terms by Lyon, J., in *Townsend* v. *Smith*, 47 Wis., 623, 3. N. W., 439, 32 Am. Rep., 793. In that case the defendant was induced to come from Chicago to Milwaukee

on the pretense that the plaintiff wanted to advertise his hotel for sale in the defendant's paper, and desired him to examine the property, offering to pay his expenses if he would. This was held to be a fraud upon him, which the law would not sustain, 'affecting as it did the integrity of the process of the court.' The suggestion that Wilcox did no more than he was entitled to do, in requiring the receipt to be sent to some one who could deliver it to him contemporaneously with the payment of the premium, entirely misses the point. If that was all there was to it, there would, of course, have been no harm. It is the artifice that lay hid in it that was the offense. A fraud or trick is always put forward with a fair face. It would not succeed without it. In *Wood* v. *Wood*, 78 Ky., 624, the defendant, a teamster, residing in Kentucky, was induced to go into Tennessee, where he was served with process, by the representation that he could make a profit in hauling from a place in that state to one in Kentucky; and, as this was true, it was contended that there was no fraud. But it was said by Hines, J.:

'It is not the truth or falsity of the representation that constitutes the fraud. It is the concealed motive lying in the breast of the appellant, and which prompted him to make the representation.'

And upon the general question of the liability of the defendant to the service it was further said:

'As he did not wittingly submit himself to the jurisdiction of the courts of Tennessee, but was induced by a device on the part of the appellant to go within the borders of that state, appellant will not be permitted to take advantage of his own wrong, and thus receive benefits that would not have accrued but for the fraud.' "

II.

Nor can it with fairness be contended that because the company was insisting upon the right to examine the body of the insured that, therefore, Dr. Mason must be held to have come into the state voluntarily and not by

the enticement of the plaintiff, and that, therefore, the service can be upheld. The fraud of the plaintiff consisted in inducing the company by artifice to confer upon Dr. Mason authority to compromise the dispute. It would have done plaintiff no good if the company had merely sent a physician into the state to make investigation, because it is too clear for argument, under the authorities above cited and under the local statute, that service upon a mere physician coming into the state for such a purpose would not be sufficient either in the Federal Court or in the local court. This accounts for plaintiff's solicitude to have the company send some one into the state with power to *compromise*. The proofs show that no such authority would have been conferred upon Dr. Mason had it not been for the urgent solicitation of the plaintiff disclosed in her letter of the 20th of February. But we do not regard this as vital. It stands out indisputably that Dr. Mason's employment was special, not general, and was limited to this particular transaction, and in such a case it is clear under the authorities that he was not such an agent as could be held in law to represent the corporation with respect to the service of process.

Insurance Company v. *Spratley*, 172 U. S., 602;
St. Clair v. *Cox*, 106 U. S., 350;
Frawley v. *Penna. Casualty Co.*, 124 Fed., 259, and others *supra*.

III.

Of equal importance is the fact that the company was not engaged in business in this state. It had no agents here, no office here, no property here. There was no local solicitation of business, as was the case in *Penna. Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S., 407. Its policies did not provide for a local adjustment of the loss by appraisers, as in the case last cited. It had no resident directors as in that case. After a corporate existence of nineteen years it had only 21 members who

were residents of Missouri, out of a total membership of 5,913, and those members had become such sporadically during this period, all the business having been transacted by correspondence and without the intervention of any person in Missouri. To hold that under such circumstances defendant was doing business in Missouri would be a contradiction in terms.

IV.

For the reasons indicated, we respectfully ask that the judgment of the court below be reversed.

Respectfully submitted,

JAMES C. JONES,
JULES C. ROSENBERGER,
KERSEY COATES REED,

Attorneys for Defendant.

Office Supreme Court, U. S.
FILED.
MAR 5 1909
JAMES H. McKENNEY,
CLERK

Number 114.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

COMMERCIAL MUTUAL ACCIDENT COMPANY,
PLAINTIFF IN ERROR,

VS.

MARY B. DAVIS, DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFF IN ERROR.

JAMES C. JONES,
JULES C. ROSENBERGER,
KERSEY COATES REED,
Attorneys for plaintiff in Error.

Number 114.

In the Supreme Court of the United States.

COMMERCIAL MUTUAL ACCIDENT COMPANY,
PLAINTIFF IN ERROR,

VS.

MARY B. DAVIS, DEFENDANT IN ERROR.

(File No. 20,771.)

REPLY BRIEF OF PLAINTIFF IN ERROR.

I. Defendant in error wholly misconceives our position in stating in her brief that we are asking this court to review the "weight of the evidence." Our contention is that there was **no evidence at all** to support the ruling of the court below on the motion to set aside the service and that on the undisputed evidence, not only that submitted by the Company, but on the sworn admissions of Mrs. Davis and her representatives, the motion should have been sustained, and that in overruling it the court below came to an erroneous conclusion of law on admitted facts.

II. Defendant in error contends that the court is precluded from reviewing the decision of the court below on the motion to set aside the service because of the provisions of Sec. 1011, Revised Statutes U. S., which provides as follows: "There shall be no re-
"versal in the Supreme Court or in a Circuit
"Court upon a writ of error, for error in ruling
"any plea in abatement, other than a plea to the
"jurisdiction of the court, or for any error in
"fact." It is accordingly urged by her that the court below having in its default judgment found that the service of summons was sufficient, this "finding" is conclusive upon this court and not open to review. This position finds no support either in reason or authority. On the contrary, it has been expressly decided otherwise by this court.

Goldey v. Morning News, 156 U. S., 518;

Mexican Central Railway v. Pinkney, 149 U. S., 194.

In Goldey v. Morning News, supra, in which the question of jurisdiction arose, as here, on a motion to set aside the service, this court, through Mr. Justice Gray, in answering this contention, said:

"The defendant in error has interposed a
"preliminary objection that the judgment of the
"circuit court upon this question cannot be re-
"viewed, because of the provision of the statutes
"that there shall be no reversal in this court upon
"a writ of error 'for error in ruling any plea in
"abatement, other than a plea to the jurisdiction
"of the court'. Rev. Stat. Sec. 1011 as amended
"by Act of Feb. 18, 1875, C. 80; 18 Stat. 318.
"But that provision, which has been part of the
"judiciary acts of the United States from the
"beginning, has never been and in our opinion
"should not be construed as forbidding the re-
"view of a decision, even on a plea in abatement,
"for any question of the jurisdiction of the court
"below to render judgment against the defend-

"ant though depending on the sufficiency of the "service of the writ. Act of Sept. 24, 1789, c. 20, "Sec. 22; 1 Stat. 25; Pollard v. Dwight, 4 Cranch "421; Harkness v. Hyde, 98 U. S. 476; Mex. "Central Ry. v. Pinkney, 149 U. S. 194."

In Mex. Central Ry. v. Pinkney, 149 U. S. 194 l. c. 208, this court, speaking to the same point, after quoting the provisions of Sec. 1011 Rev. Stat. U. S., said:

"This entirely preserves to this court the right "and duty to pass upon the jurisdiction of the lower court." And in support of this holding this court calls attention to the first clause of Sec. 5 of the Act of March 3, 1891, 26 Stat. 826, c. 517, under which the case at bar comes to this court and which provides for a direct appeal to the Supreme Court "in any case "in which the jurisdiction of the court is in issue," and that "in such cases the question of jurisdiction "alone shall be certified to the Supreme Court from the court below for decision." This court held that if the contention now made were to be sustained,

"These provisions of the Federal Statutes which "confer upon litigants in the Federal Courts the "right to have the jurisdiction of the court below "reviewed by this court upon appeal or writ of "error would be practically destroyed or ren- "dered inoperative and of no effect."

This is not a case in which the court below on conflicting evidence sustained its own jurisdiction by holding the service sufficient. On the contrary, there is no conflict in the proof, the evidence is undisputed and the sole question involved is as to whether or not the court erred in matter of law in conceiving and holding that on these facts the service was sufficient. If it did err in so ruling and in thereafter entering judgment on such void service against the Company, and if notwithstanding such erroneous decision this court were without power to look into the record and correct the error, the whole object of the Statutes

providing for a writ of error direct to this court in jurisdiction cases would be frustrated and these statutes rendered nugatory and of no effect. No matter how unjust the result nor how erroneous the decision, this court would be impotent to correct the error. Such cannot be and under the decisions cited is not the law.

III. It is further contended that because the sheriff in his return and the court in its default judgment against the Company recited that the Company was engaged in business in the States and that Dr. Mason, the person to whom the summons was delivered, was authorized to receive process on its behalf, that these recitals are conclusive upon this court and not open to review.

This contention wholly ignores the fact that the evidence which shows exactly how this service was attempted to be made, was incorporated in a bill of exceptions and thereby made part of the record itself.

At best, the recitals of the sheriff's return are only prima facie evidence of the matters therein set forth and it is fundamental that a finding by the court on the question of jurisdiction is not conclusive where the record itself shows that the finding is not true because it is a settled rule in regard to the effect of records as evidence that one part of a record may be impeached by another part and where, as here, the evidence as to service is embodied in a bill of exceptions, the evidence therein presented will govern and control the jurisdictional recitals of due service of process contained in a sheriff's return or in a judgment.

17 Am. & Eng. Enc. Law (2nd Ed.) pp: 1077, 1082.

Settlemeier v. Sullivan, 97 U. S. 444;
Galpin v. Page, 18 Wall, 366;
Laney v. Garbee, 105 Mo. 360;
Johnson v. Hunter, 147 Fed. 188.

The presumption in support of the judgments of courts of general jurisdiction only arises with respect to jurisdictional facts **as to which the record is silent.** When the record sets out the evidence as to service it will be presumed that it contains **all** the evidence, not that there was other or different evidence to support the judgment.

Settlemeier vs. Sullivan, 97 U. S. 444;
Galpin v. Page, 18 Wall, 366;

In 17 Am. & Eng. Enc. Law (2nd Ed.) 1082 the law is stated as follows:

> "A finding by the court on the question of "jurisdiction is not conclusive where the record "itself shows that the finding is not true because "it is also a rule in regard to the effect of records "as evidence that one part of a record may be "impeached by another part." (Citing many authorities.)

In Settlemeier v. Sullivan, 97 U. S. 448, the recital in the entry of the default judgment rendered against the defendant was "that although duly served with process, he did not come, but made default," and it was contended that this recital was conclusive evidence of the jurisdiction of the court, notwithstanding other parts of the record speaking to the subject failed to show valid service of process. In answering this contention, Mr. Justice Field said:

> "We do not question the doctrine that a "court of general jurisdiction acting within the "scope of its authority—that is, within the boun- "daries which the law assigns to it with respect "to subjects and persons—is presumed to act "rightly and to have jurisdiction to render the "judgment it pronounces, until the contrary ap- "pears. But this presumption can only arise with "respect to jurisdictional facts, **concerning which "the record is silent.** It cannot be indulged "**when the evidence respecting the facts is stated, "or averments respecting them are made.** If the

"record is silent with respect to any fact which "must have been established before the court "could have rightly acted, it will be presumed "that such fact was properly brought to its "knowledge. **But if the record give the evidence,** "or make an averment with respect to a juris- "dictional fact, **it will be taken to speak the truth "and the whole truth,** in that regard; **and no pre- "sumption will be allowed that other and dif- "ferent evidence was produced,** or that the fact "was otherwise than as averred."

And in Laney v. Garbe, 105 Mo. 360, the court said:

"Since the decision in the case of Cloud v. "Pierce City, 86 Mo. 358, where the question was "exhaustively considered, it has been held in this "State even in collateral proceedings that the "jurisdictional recitals of a judgment of due serv- "ice of process will be controlled by and must "yield to the service as it appears upon the whole "record. The recitals of the judgment will be "deemed to refer to the kind of service shown by "other parts of the record. Milner v. Shipley, 94 "Mo. 106; Adams v. Cowles, 95 Mo. 506; Crow v. "Myersieck, 88 Mo. 415; McClenahan v. West, "100 Mo. 321; Blodgett v. Schaffer, 94 Mo. 671."

Accordingly in the case at bar the recitals in the judgment entry rendered by default against the Company to the effect that process had been legally served on the defendant must be deemed to refer to the evidence set forth in detail in the bill of exceptions which had previously been allowed by the court and by it formally certified and ordered made a part of the record. If, as we contend, this evidence fails to show valid service of process, the recitals in the Sheriff's return and in the judgment entry will avail defendant in error nothing, and it will not be presumed that there was other or different evidence to support the judgment.

IV. It is next contended by defendant in error that because the Bill of Exceptions does not expressly and in so many words state that it contains all the evidence offered and introduced for and against the motion to set aside the service, this court will not review the action of the court below.

There are several answers to this:

(1) If the record as a whole, as in the case at bar, satisfactorily shows that all the evidence was incorporated in the bill of exceptions, no affirmative statement to that effect is necessary.

Gunnison County v. E. H. Rollins, 173 U. S. 255;

Crowe v. Trickey, 204 U. S. 228.

(2) As already noted, the presumption which the law implies in support of the judgments of courts of general jurisdiction only arises with respect to jurisdictional facts **concerning which the record is silent.** When the record **states the evidence** it will not be presumed in support of the judgment that there was **other or different evidence** respecting the fact. As said by Mr. Justice Field in Settlemeier v. Sullivan, 97 U. S. 448: "If the record give the evidence "with regard to a jurisdictional fact, it will be taken "to speak the truth and the whole truth in that re-"gard, and no presumption will be allowed that other "or different evidence was produced."

17 Am. & Eng. Enc. Law (2nd Ed.) 1077;

Johnson v. Hunter, 147 Fed. 138;

Settlemeier v. Sullivan, 97 U. S. 444.

The usual evidence of jurisdiction is the return or certificate of the officer whose duty it was to serve the process, but this, even if sufficient in form, is but prima facie evidence of the fact and is subject to be rebutted by other evidence contained in the record. If the record fail to show the sheriff's return of service, **and nothing else appears to the contrary,** the deficiency will be supplied by a recital in the judgment

entry that due service of process was had, because it is presumed in favor of the judgments of courts of general jurisdiction that all steps necessary to the exercise of jurisdiction have been taken. But, as we have seen, when the record by bill of exceptions or otherwise affirmatively shows facts contradicting the sheriff's return and the recitals of the judgment, such evidence will overcome the effect of such recitals and it will be presumed to contain **all the evidence** as to the fact and the judgment will not be aided by any presumption of the existence of other or different evidence. In the case at bar the recitals of the sheriff's return and of the default judgment rendered against the Company are flatly contradicted by the evidence set out in the bill of exceptions. Defendant in error is asking this court to presume that there was other and different evidence produced in support of the action of the court. This, under the authorities cited, this court will not do. Moreover, the defendant in error is in no position to urge this objection, because in the depositions of herself and of her advisers and agents, introduced on the hearing of the motion to quash the service, and copied in full in the bill of exceptions, they under oath made such admissions concerning the manner in which the process was served on the putative agent of the Company, as alone and independently of any evidence introduced by the Company, rendered the service illegal. These admissions made by plaintiff herself and by her agents were judicial admissions, were made in the most solemn way, were offered on behalf of the plaintiff herself, and are binding upon her. Regardless of any other evidence which might have been produced —and none was produced except that contained in this record—these admissions alone are enough to nullify the service attempted to be made.

(3) A further answer to this criticism of the bill of exceptions is that this case is certified to this

court under the provisions of the first clause of Sec. 5 of the Act of March 3, 1891, which provides for a direct resort to this court "in any case in which the jurisdiction of the court is in issue" and that "in such "cases the question of jurisdiction alone shall be cer- "tified to the Supreme Court from the court below "for decision." This court has held that where, as here, it appears that the only question tried and determined in the court below was the question of jurisdiction and where, as here, the ruling of the court below on the question of jurisdiction is presented by bill of exceptions, no formal certificate is required and that the Statute is sufficiently complied with by the allowance of the bill of exceptions and by a statement in the order allowing the writ of error to the effect that same was allowed solely to review the question of jurisdiction. Under the statute thus interpreted the allowance by the court of the bill of exceptions on the single question of jurisdiction is in itself part of the act of certification to this court. (In Re Lehigh Mining Company, 156 U. S. 322; Shields v. Coleman, 157 U. S. 168; Interior Construction Company v. Gibney, 160 U. S. 219 l. c.)

When the court in the case at bar stated in its order allowing the writ of error to this court (Record p. 12) that it did so solely to review the propriety of its ruling on the motion to set aside the service, a ruling preserved and made part of the record by bill of exceptions previously filed, the court in effect said that said bill of exceptions contained all the evidence necessary to review that question and it will not be presumed that the court below should stultify itself by failing to send to this court all of the evidence.

Under the statute the court below in certifying the question of jurisdiction to this court could have pursued one or t[illegible]ther of two methods: (a) It could have made up a formal certificate setting forth the facts upon which its ruling was predicated and presenting the single and definite question of law as

to whether upon those facts jurisdiction did or did not exist—a certificate analogous in form and governed by the rules heretofore prevailing in reference to certificates on decision of opinion. (Maynard v. Hecht, 151 U. S. 324.) (b) Or it could have pursued the method which it did pursue; namely, preserve its ruling on the question of jurisdiction in a bill of exceptions and state on the record in its order allowing the writ of error or in some other appropriate way that the only question sent up for decision was that of jurisdiction. (Re Lehigh Mining Company, 156 U. S. 322.) Thus considered the bill of exceptions in combination with the order allowing the writ of error stands in lieu of and takes the place of any further certificate or statement of facts, and is treated as part of the certificate itself. (Re Lehigh Mining Company, 156 U. S. 322.) It is in effect as if the court had stated formally on the record, as in reality it did, that its decision was predicated on the evidence set out in the bill of exceptions and on that evidence alone. The court having thus certified the question to this court, it will be presumed in favor of the action of the court below that it thereby certified to this court all the evidence which was before it on this question, a presumption which it is necessary to indulge in view of the special and peculiar statutory provisions regulating appeals and writs of error to this court in jurisdiction cases.

The motion to set aside the service was denied by the court below on April 30, 1907 (10) and leave was granted to the Company to file bill of exceptions within thirty days thereafter (10). Within that time and on May 2, 1907, the Company tendered to the court its bill of exceptions setting out the motion, the evidence given upon the hearing thereof and the ruling of the court thereon, and the court formally allowed and certified to the same and it was on the same day filed and made a part of the record. (10, 81.) Afterward, on June 7, 1907, the court allowed this

writ of error to this court and in so doing entered its order (12) as follows:

> "Said writ of error is allowed in order that "the said Supreme Court may review the single "and definite question as to whether there has "been such service of process upon the defendant "in this cause, as to confer upon the Circuit Court "the right, power and jurisdiction to render judg- "ment against defendant—that is to say, whether "the Circuit Court erred in overruling defend- "ant's amended motion to set aside the return of "service made by the sheriff of Howard County, "Missouri, to the writ of summons in this cause "and in thereafter taking and exercising juris- "diction in this cause."

The court also in a separate certificate made substantially the same statement. (Rec. 14.)

In view of these express references by the court in its order allowing the writ of error to its ruling on the motion to set aside the service, a ruling preserved in the bill of exceptions then on file, it would certainly be absurd to indulge the presumption which defendant in error asks this court to indulge—that such bill of exceptions does not include all the evidence.

(4) But there is another reason why it is not open to defendant in error to contend that the bill of exceptions does not affirmatively show that it contains all of the evidence for and against the motion to quash. Before the bill of exceptions was signed and allowed by the court below it was presented to Mrs. Davis's counsel for their approval. They approved the same, and certified to the correctness of the bill of exceptions by endorsing at the foot of the same the letters "O. K.," followed by their signatures. The abbreviation "O. K." has a well-defined meaning, and signifies "All right," "Correct," (21 A. E. Encyc. of Law, 2nd Ed. 915; 29 Cyc. 1474; Citizens' Bank v. Farwell, 56 Fed. 571; Railroad v. Sands, 133 Ind.

441). It also signifies "In good condition" (Morganton Manufacturing Company v. Railroad, 121 N. C. 517). When, therefore, the bill of exceptions was presented to the court below bearing the endorsement "O. K." made by the attorneys for Mrs. Davis, they signified to the court their approval of said bill in all respects, and it is hardly to be supposed that they would have approved said bill if it had not included all of the evidence for and against the motion. The endorsement "O. K." in this connection means more than a mere certification of the correctness of the contents of the bill of exceptions, but under the circumstances shown by this record signifies that it does contain all of the evidence. Only a single question was involved in the matters included in the bill of exceptions; namely, the propriety of the action of the court in overruling the motion to set aside the service, and certainly Mrs. Davis's attorneys would never have approved the bill of exceptions if it contained less evidence than was necessary to review that question.

In Citizens' Bank v. Farwell, 65 Fed. 571, a stipulation filed in the cause was in the following words: "The parties appearing by their respec-"tive counsel * * * said parties in open court waived "a jury and consented that said cause be tried by the "court." The signatures of counsel preceded by the letters "O. K." were attached to this agreement. It was contended that counsel in signing the agreement only intended to "O. K." the correctness of the record entry, but did not intend thereby to waive the jury. The court refused to sustain this contention. Judge Caldwell said: "If counsel did not by their signatures "to this agreement or record entry intend to attest the "fact in writing that a jury had been waived, it is "difficult to understand what was intended. They, of "course, did not intend to mislead or deceive the "court; though if their present contention should be

"sustained their action would have precisely that "result."

And in Railroad v. Sands, 143 Ind. 441, it was held that where the letters "O. K." were signed by the attorneys to a decree they signified an assent to the decree as drafted, not merely to the correctness of the decree in form and that their action was binding on their clients.

The endorsement of the letters "O. K." followed by the signature of Mrs. Davis's attorneys on the foot of the bill of exceptions did not appear upon the transcript of the record filed in this court by the Clerk of the court below, and therefore did not appear on the printed record: this on account of an inadvertence by the clerk of the court below. But by a stipulation between counsel, on file in this court, the facts as above stated with respect to said endorsement are stipulated, and that such endorsement was in fact made by Mrs. Davis's attorneys on the bill of exceptions before it was signed and allowed is by said stipulation expressly admitted.

For all of the reasons above set forth, we submit that the contention made by Mrs. Davis with respect to the bill of exceptions must be refused.

CORRECTIONS OF THE STATEMENT OF THE CASE MADE BY DEFENDANT IN ERROR.

Counsel for defendant in error lay much stress upon the fact that on February 28, 1907, the day after the summons in this case was delivered to him, Dr. Mason consulted counsel at Kansas City, Missouri, and that on the same day said counsel on the Company's behalf prepared the petition and bond for the removal of the cause, and that said petition was filed in the State Court on March 1, 1907, the day after its preparation. The statement is made by counsel in their brief that Dr. Mason consulted counsel who afterward appeared for the Company at Kansas City on the day following the attempted service of process, and that he did this "without any other authority "than he received from defendant before he came to "Fayette." The inference which counsel seek to have this court draw from these facts is that Dr. Mason, as they assert, had authority to employ counsel, and therefore he also had authority to receive service of process.

This argument, however, is not borne out by the record. On the contrary, the undisputed proof is that Dr. Mason had no authority whatever to employ counsel until after the summons in this case had been delivered to him. (See affidavit of Frank G. Mason, 23; affidavit of H. B. Meininger, 29; deposition J. C. Rosenberger, 79, 80.) The proof shows that as soon as the summons was delivered to him by the sheriff Dr. Mason telegraphed the Company to that effect, and the Company in its telegraphic reply directed him to employ the firm of Rosenberger and Reed at Kansas City, Missouri, and that all consultation had with these attorneys by Dr. Mason was pursuant to the

direction contained in that telegram, and that until that telegram was received he had consulted no attorneys at all. (Record, 23, 29; 79, 80.) It will also be remembered that at the time the summons in this case was delivered to Dr. Mason there was also delivered to him by Mrs. Davis's attorneys a notice that depositions would be taken in the case at Fayette, Missouri, on March 4, 1907, on her behalf; also a subpoena commanding Dr. Mason to appear before a notary public in the law office of one of Mrs. Davis's attorneys at Fayette on March 4, 1907, and then and there testify as a witness in the case. Dr. Mason's home was in Chicago. To have obeyed the said subpoena would have required his remaining in Missouri from February 27 until March 4, a period of five days. He had no knowledge as to his duty with respect to such subpoena, was a stranger in the jurisdiction, was not a lawyer; and it is therefore not surprising that he forthwith telegraphed the Company for instructions as to employment of counsel, nor is it surprising, in view of the unusual circumstances under which the service was attempted, that the Company should have regarded the immediate employment of counsel and the taking of immediate steps for the protection of its interests, as so imperative as to make necessary the use of the telegraph for this purpose.

The statement is persistently made in the brief of defendant in error that the policy sued on, and other policies, were delivered by the Company in Missouri. The record shows the contrary to be the fact, and shows in the most explicit manner that all of the very few policies which the Company occasionally issued to persons residing in Missouri were delivered by it to the assured at its home office in Philadelphia. (See affidavit of Meininger, 25, 26; and see form of policy and application attached to said affidavit, page 30). The policy issued to Mr. Davis and inserted in the record between pages 30 and 31 contains the following recital: "In witness whereof the Commercial

"Mutual Accident Company of the State of Pennsyl-
"vania has caused these presents to be signed by its
"President, attested by its Secretary, and the seal of
"the Company attached, **and delivered at the office of
"the Company in the City of Philadelphia, State of
"Pennsylvania."**

The application for the policy in suit shows that it was received and accepted by the Secretary at Philadelphia. (Record 30.)

Counsel also state in their brief: "Many losses "during more than ten years, according to the proof, "had been adjusted or settled by this Company under "the terms of said contracts with its members and "beneficiaries in the State of Missouri." If there is any evidence in this record bearing out this statement, we have failed to find it.

On page 10 of their brief counsel make the following statement: "On March 28, 1907, the attor-
"neys for the Company prepared notice to take depo-
"sitions, concerning which the parties stipulated as "follows: 'Service of the above notice is hereby ac-
"knowledged, and issue of subpœdimus and all excep-
"tions as to time waived, and it is hereby agreed that "the deposition may be taken in shorthand and then "transcribed and signed.'" But counsel have failed to call the attention of the court to the fact that in the notice upon which the above stipulation was endorsed it is expressly stated that said depositions are taken "solely in support of the Company's motion to quash "or set aside the return of service in said cause, x x x x "said defendant appearing solely for said purpose and "without waiving any of its objections to the return "of said service in said cause or to the jurisdiction of "said court." (Record, 83.) The Company thereby made plain its intention not to waive, but on the contrary to insist on the invalidity and insufficiency of the service, and no waiver can be predicated thereon. The Company would not have waived its rights by taking depositions, even if this express statement of

its purpose had been omitted. (Stonega Coal & Coke Company vs. Louisville Company, 139 Fed. 291; Pacific Mutual Life Insurance Company v. Tompkins, 101 Fed. 539). But in view of the express language of the notice, certainly no waiver can be predicated thereon.

It is also stated on page 10 of the brief of opposing counsel that "these depositions were offered in "evidence by the Company upon the hearing of the "motion to quash." On the contrary, the record shows that these depositions were offered in evidence, not by the Company but by Mrs. Davis (Transcript, 34). This for the sake of accuracy.

We respectfully renew our prayer that the judgment of the Court below be reversed.

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Attorneys for plaintiff in Error.

Supreme Court, U. S.
FILED
MAR 10 1909
JAMES H. McKENNEY,
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 114.

COMMERCIAL MUTUAL ACCIDENT COMPANY,
PLAINTIFF IN ERROR.

VS.

MARY B. DAVIS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILE NO. 20771.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

WILLIAM C. SCARRITT,
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Attorneys for Defendant in Error.

EDWARD L. SCARRITT,
Of Counsel.

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STATEMENT.

On February 27, 1907, Mary B. Davis, defendant in error, commenced her suit in the Circuit Court of Howard County, Missouri, against the plaintiff in error, to recover on a policy of insurance issued by defendant in her favor by which it insured her in the sum of five thousand dollars against the accidental death of her husband, Arthur F. Davis.

Plaintiff in error was, when the suit was brought, a corpo-

ration organized under the laws of the State of Pennsylvania and doing business in Missouri and having no office or place of business in Missouri and not incorporated under its laws nor authorized to do business in that state (Sheriff's Return, Transcript p. 7, Judgment, Transcript p. 11).

On August 6, 1896, Arthur F. Davis, the insured, who was then, and until his death, remained a citizen and resident of the State of Missouri and domiciled therein, became a member of defendant company and continued to be a member of the organization in good standing until his death; and on the day last named the defendant company issued to him, as one of its members, the policy of insurance sued on. One of the conditions entitling his representative to benefits under that policy of insurance was that he should "remain in good standing as a member of the company." (The Petition, Transcript p. 5.) The plaintiff in error stands as admitting on this record that on March 22, 1907, it had twenty-one members resident in Missouri, and citizens of Missouri, who held certificates or policies of insurance in the company; but the record is significantly silent as to the number of citizens of that state who had held policies of insurance during the period of more than ten years covered by the membership of the deceased Arthur F. Davis (Transcript p. 25). The inference arises from the language of the *ex parte* affidavit of the company's secretary that its business had been much larger in the earlier part of its career—possibly at a period when its methods of conducting its business were not so well known.

On December 31, 1906, the insured, Mr. Davis, received an accidental gun shot wound in the stomach, of a serious character. He was unable to arise from the bed after receiving the wound,

and his life hung in a precarious condition for four days, when he died from the effects of that wound on January 4, 1907 (Transcript p. 70).

On January 7, 1907, the Insurance Company was notified of the accidental death of the insured (Transcript p. 26). The company made no written acknowledgment of this notice; but on January 14 and 15, 1907, Frank B. Mason, of Chicago, appeared at the City of Fayette, Missouri, the home of the deceased. He was there admittedly as the agent of the company, and as such talked with the deceased's son and Mrs. Davis, the widow, and suggested a settlement or compromise of the claim. He talked with the physicians who had held an autopsy upon the deceased and stated that "he could compromise the claim" (Transcript pp. 55, 56). He spoke disparagingly of the company, its financial condition and its methods, and urged a compromise rather than an autopsy (Transcript pp. 45, 55, 56). Nothing definite was accomplished in these negotiations. While he claimed during that visit to represent the company and to have authority to settle the loss, he produced no written authority. Naturally the company's *ex parte* affidavit recites that Mason at that time had no authority to compromise the claim (Transcript p. 26).

On January 26 defendant in error, through her son, requested for a second time proof of death blanks of the defendant. This request was replied to by the defendant with the suggestion that it be given an opportunity to examine the body of the deceased, which had then been buried for nearly four weeks. This communication adroitly added, "We have decided that such examination is necessary in order to properly determine the

exact cause of death" (Record pp. 26, 27). Defendant in error replied to the suggestion through her son and referred to the autopsy which had been held by three of the most reputable doctors of the county, and added, "I think your demands are entirely uncalled for" (Transcript p. 27).

On February 6, 1907, after ample time for deliberation, the company wrote Mrs. Davis asserting falsely that she had twice refused to permit the company to examine the body of her husband and threatening, if she again declined, to reject any claim made under the policy (Transcript pp. 27, 28). A copy of this threat, doubtless for its moral influence, was sent to the son (Transcript p. 28).

On February 20, 1907, Mr. Murray H. Davis, the deceased's son, sent to the defendant the letter of that date which his mother signed. And he wrote it himself. Counsel for defendant in error is, by the proof, deprived of any participation in the authorship of so sensible a letter. Mr. Murray H. Davis testified on cross examination by the company's counsel thus:

"Q. Isn't it a fact that you wrote that letter of February 20th, at the suggestion of Mr. Scarritt? A. I wrote it myself. * * *

Q. You have not answered the question, Mr. Davis? A. No; I wrote the letter.

Q. Didn't Mr. Scarritt? A. I wrote all of this letter. * * *

Q. I want to know if Mr. Scarritt suggested it to you. A. No, sir, he didn't" (Transcript p. 58).

The letter is as follows:

"Farmers & Merchants Bank.

Fayette, Missouri, Feb'y. 20, 1907.

Commercial Mutual Accident Insurance Co.,
Philadelphia, Pa.

Gentlemen:

In reply to your favor of the 6th will say that I am very sorry that you still insist on having some one examine the body of my deceased husband, as I hoped you would be satisfied with the examination of these doctors here, as they are physicians of high standing and fully competent to hold such an examination.

However, if you think it is right you may send some one here to examine the body for you. Can't you also send some one authorized who could settle the claim here if your doctor found everything as reported, as most all of the claims have been paid, and I am very anxious to have the balance settled as soon as possible.

Then, too, if I should want to compromise the claim in lieu of an examination, your agent would have power to settle it without any delay. Please let me know just when you will send some one as I am thinking of going to St. Louis for a few days and would like to be here when he comes, so let me know several days in advance.

Yours very truly,
(Signed) MRS. MARY B. DAVIS."
(Transcript p. 59.)

On February 22, 1907, defendant answered that letter as follows:

"Philadelphia, February 22, 1907.

Mrs. Mary B. Davis, Fayette, Mo.

Dear Madam: Your letter of February 20th has been received. We shall immediately arrange to have our medical representative in Fayette as soon as possible. He will have authority to make an adjustment should that course be advisable.

Very truly yours,
HORACE B. MEININGER, *Secretary.*"
(Transcript p. 29).

On the morning of February 27, Frank G. Mason appeared in Fayette, by telegraphic appointment (Transcript p. 45). Before he reached there this wire was sent from the defendant to him at Fayette, where it awaited his arrival:

"Philadelphia, Penn., 26th.

Dr. Frank G. Mason, Fayette, Mo.:

Where will letter reach you wire immediately—may send something.

HORACE B. MEININGER.

4:30PM" (Transcript p. 31).

This Horace B. Meininger was the secretary and a managing officer of the company.

He answered as follows:

"Fayette, Mo., 2/27, 1907.

To Horace B. Meininger, Sec'y Com. Mut. Accident Co., Girard Bldg., Philadelphia, Pa.:

Just arrived. Mail too slow. Wire significance, or use long distance. Will await before conferring. Quick.

FRANK G. MASON,
Hotel Howard."
(Transcript p. 32).

Then, on the same day, this wire was sent by the defendant to him:

"SD C 33 Paid x Philadelphia, Pa., 27.

Dr. Frank G. Mason, Fayette, Mo.:

Their proofs refer to post mortem made by three physicians but give no particular. Not at all satisfactory. Remember we declined furnish claim blanks, *try to report something today* may be away tomorrow.

1:20 P. M. HORACE B. MEININGER"
(Transcript p. 32).

About ten o'clock in the morning, on February 27, 1907, Mr. Frank G. Mason and Mr. Murray H. Davis, the latter accompanied by Dr. Givens and Mr. Scarritt met by appointment

at the hotel just across the principal street from the court house at Fayette and took up the business in hand. Mr. Mason produced and delivered to Mr. Davis the following letter of authority:

"Philadelphia, February 22, 1907.

Mrs. Mary B. Davis, Fayette, Mo.

Dear Madam: The bearer, Dr. Frank G. Mason, is fully authorized to act on behalf of this Company in relation to a post mortem examination on the body of your late husband, Mr. Arthur F. Davis, and is also authorized to adjust the claim.

Very truly yours,

HORACE B. MEININGER,

Secretary."

(Transcript p. 62).

A general discussion of the claim and its settlement was participated in by all present, during which Mr. Mason said that "he had full authority to settle." The proof is:

"Q. Did he say anything about his authority to make an actual payment? A. Yes, sir; he said he could write a draft for the payment of the money" (Transcript p. 53).

He offered to pay $2,500.00 in settlement of the claim. This was declined (Transcript p. 53). He was asked if he could settle on the basis of ninety cents on the dollar and he said he could not give that much (Transcript p. 65). These negotiations continued about an hour (Transcript pp. 52 and 67). When no agreement came of these negotiations, Mr. Scarritt said to him in substance "that we had been advised that he would be here to make an examination of the body of Mr. A. F. Davis and that we were now prepared and ready to tender him the opportunity to make that examination, if he desired to do so, and to go to the cemetery with him for that purpose." He

declined to make any assent to the proposition or make any reply to the suggestion; and then this suit was begun by filing the petition with the clerk of the Circuit Court and the sheriff appeared upon the scene and served the writ of summons upon Mr. Mason. The sheriff's return is as follows:

SHERIFF'S RETURN.

"Executed the within Writ in the County of Howard and State of Missouri, on the 27th day of February, A. D. 1907, by delivering a copy of the petition in this case hereto attached and a copy of this writ to Frank G. Mason, agent of the within named defendant, the Commercial Mutual Accident Company, a corporation organized under the laws of the State of Pennsylvania, and doing business in this State, but having no office or place of business herein, and not incorporated under the laws of this State nor authorized to do business in this state, and while he, the said agent, was transacting business for the said defendant in our said county, and while he was adjusting or settling a loss on a policy of insurance for said defendant or was aiding and assisting in so doing.

GEO. D. GIBSON,
Sheriff, Howard County, Missouri,
By. H. L. HUGHES, *Deputy.*"
(Transcript p. 7).

Thereupon, Mason wired defendant as follows:

"Fayette, Mo., Feb'y. 27, 1907.

To Horace B. Meininger, Sec'y. Com. Mut. Accid. Ins. Co., Girard Bldg., Philadelphia, Pa.

Nothing doing. Ruse papers served me. Depositions March fourth. Starting Kansas City see attorney. Midland Hotel.

FRANK G. MASON."
(Transcript p. 32).

At three o'clock on that afternoon he left Fayette for Kansas City, distant about one hundred and forty miles, and there

consulted Messrs. Rosenberger & Reed, the attorneys who immediately thereafter proceeded to and now represent the plaintiff in error.

All the telegraphic communications that passed between Mason and the Company at Fayette are set out in the record and have heretofore been shown in full, and his conduct in going to Kansas City and consulting these attorneys without any other authority than that he received from defendant before he came to Fayette is certainly to be considered as a potent fact in determining what his authority was, especially in view of the fact that the defendant Company has seen fit to leave this record silent as to the actual authority conferred on Mr. Mason by the defendant. Not one of their letters to him, nor any contract of employment, have been incorporated in this record. The words of the Company's telegrams to their agent, "try and report something today," and his answer when suit was begun, "Nothing doing," "starting to Kansas City to see attorney," warrant the deduction that through this man, Mason, the Company was acting *pro hacc vice* endeavoring to beat down the claim and settle it, and failing to do so, retaining attorneys to resist the claim.

On February 28, 1907, Mr. J. C. Rosenberger prepared and verified by affidavit a petition to the state court to remove this cause to the United States Circuit Court (Transcript pp. 8, 9), and this petition was filed at Fayette on March 1, 1907, the day after it was verified, and within two days after this suit was instituted, by the counsel whom Mr. Mason had consulted at Kansas City (Transcript p. 7). On this petition the case was removed to the United States Circuit Court, and on March 25, 1907, the

Company filed a motion to set aside and quash the return on the writ of summons (Record p. 16).

On March 28, 1907, the attorneys for the Company prepared a notice to take depositions, concerning which the parties stipulated as follows:

"Service of the above notice is hereby acknowledged and issue of dedimus and all exceptions as to time waived, and it is hereby agreed that the deposition may be taken in shorthand and then transcribed and signed" (Transcript p. 34).

These depositions were offered in evidence by the Company upon the hearing of the motion to quash (Transcript p. 33).

On April 29, 1907, the defendant filed its amended motion to quash the return of the sheriff of Howard County to the writ of summons, which is fully set out on pages 17 and 18 of the printed record: The contention of that motion being, that the Company was not doing business in the State of Missouri; that Mason was not such an agent of the Company that service of summons upon him, at the time, place and under the circumstances of the service, would be service upon the Company; that Mason was fraudulently induced to come into this state for the purpose of suit. No question is raised in this motion as to the validity of the Missouri Statutes relative to the service of summons in that state.

Upon hearing full proof this motion was by the court overruled (Transcript p. 10).

The Company having failed within the required period to plead to the merits of the case, on May 2, 1907, the cause coming on regularly for trial, the plaintiff submitted her proofs and judgment was entered in favor of the plaintiff, as prayed, and the court, among other things, found and entered of record, as follows:

JUDGMENT ENTRY.

"The court having heard the evidence and being fully advised in the premises doth find that the defendant is a corporation organized under the laws of the State of Pennsylvania, and that at the time of service of process herein upon it it had no office or place of business in this state, and was not authorized to do business in this state by the superintendent of insurance of this state, and that it, the said defendant, then had, and for a long time prior thereto had, a large number of insurance policies outstanding upon citizens of this state, and at such time it was doing business in this state and had an agent in this state with full authority to adjust or settle a loss and to pay the same for the defendant corporation, and which said agent, viz.: Frank G. Mason, on whom service of process for defendant was had, was at the time of such service of process engaged in adjusting or settling a loss on the policy of insurance sued on in this action, or was aiding and assisting in so doing in this state" (Transcript p. 11).

The statutory methods in Missouri of serving summons on a non-resident insurance company who has not complied with the laws of that state relative to foreign corporations transacting business therein are as follows:

Revised Statutes of Missouri, 1899, Vol. 1, Section 570, provides as follows:

"A summons shall be executed, except as otherwise provided by law, either * * fourth, where defendant is a corporation or joint stock company, organized under the laws of any other state or country, and having an office or doing business in this state, by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business, or if it have no office or place of business, then to any officer, agent or employe in any county where such service may be obtained, and, when had in conformity

with this subdivision, shall be deemed personal service against such corporation, and authorize the rendition of a general judgment against it."

And Section 7992, Vol. 2, R. S. Mo. 1899, provides as follows:

"Service of summons in any action against an insurance company, not incorporated under and by virtue of the laws of this state, and not authorized to do business in this state by the superintendent of insurance, shall, in addition to the mode prescribed in Section 7991, be valid and legal and of the same force and effect as personal service on a private individual, if made by delivering a copy of the summons and complaint to any person within this state who shall solicit insurance on behalf of any such insurance corporation, or make any contract of insurance, or collects or receives any premium for insurance, or who adjusts or settles a loss, or pays the same for such insurance corporation, or in any manner aids or assists in doing either."

The service of the summons in this case was made in compliance with each and both of these enactments.

The case comes here on writ of error prosecuted by the Insurance Company. Its assignments of error, both in the court below and those asserted in this court (Transcript p. 13; Brief for Plaintiff in Error p. 27), seek to review the question of the weight of the evidence on which the court's finding was based, and the sufficiency of the return of the sheriff, upon its face, and so, if possible, to defeat the jurisdiction of the Federal Court, as well as the state court, of the person of the defendant. No assertion is made in either of the assignments that there is no evidence in the record to support any or either of the facts necessarily determined by the court in arriving at the general finding for the plaintiff. The bill of exceptions nowhere recites

that it contains all the evidence submitted to the trial court. No question is raised by these assignments as to the constitutionality or validity of the Missouri statutes, relative to the service of summons in suits begun in that state. No federal question is asserted. The court, in certifying the question of jurisdiction to this court, asserts:

"Said question arose on defendant's amended motion to set aside the return of service made by the sheriff of Howard County, Missouri, to the writ of summons herein and to dismiss this cause for want of jurisdiction over defendant. This court, conceiving that the service of said summons upon defendant was valid and sufficient to give this court jurisdiction overruled said motion, proceeded to exercise said jurisdiction and rendered final judgment against defendant" (Transcript p. 14).

BRIEF.

I.

The finding of the lower court that the plaintiff in error was doing business in the State of Missouri, and that there was no fraudulent enticement of defendant below into this state, and that due service of the process upon the defendant had been made, is, upon this record, conclusive upon this court.

a. The bill of exceptions does not purport to set out all of the evidence heard or considered by the court. It does not recite that it contains all the evidence. It is apparent upon the face of the record that the proofs before the court at the trial, when the general finding and judgment were made and entered in this cause, which occurred May 13, 1907 (Record p. 11), were not and could not have been embraced in the bill of exceptions now before this court, for the bill was signed and allowed May 2, 1907 (Record p. 81), that is, ten days before that hearing was had.

In *Russell* v. *Ely*, 67 U. S. (2 Black.), 575, 580, it is said:

"It is true that this court does not see anything in that part of Baker's testimony embodied in the bill of exceptions which justifies such an inference. But the bill of exceptions does not purport to give all that he said, and, according to a well known rule, this court, under such a condition of the record, is bound to presume that there was that in Baker's testimony which justified the instruction."

In *Texas & Pacific Ry. Co.* v. *Cox*, 145 U. S., 593, at page 606, it is said:

"The bill of exceptions does not purport to contain all the evidence, and it would be improper to hold that the court should have directed a verdict for defendants for want of that which may have existed."

In *United States* v. *Copper Queen Mining Co.*, 185 U. S., 495, at page 497, it is said:

"It does not appear from the bill that it contains all the evidence given upon the trial. It may be that it does, but we can not, in the absence of any statement in the bill to that effect, presume it does for the purpose of reversing the judgment herein, upon the assumption that the proper construction of the act of Congress requires such citizenship as well as residence. When this court is asked to reverse a judgment entered upon a verdict of a jury, upon a writ of error, upon the ground that there is absolutely no evidence to sustain it, and the court should have directed a verdict, the bill of exceptions must embody a statement, or there must be a stipulation of counsel declaring that the bill contains all the evidence given upon the trial, so that the record shall affirmatively show the fact."

b. Rev. Stats. United States, Sec. 1011, 1 Stat. at L., 85, is as follows:

"There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, *or for any error in fact.*"

In *Jeffries* v. *Mutual Life Ins. Co.*, 110 U. S., 305, the facts passed on are about these: A judgment formerly entered in the cause was acknowledged to be satisfied upon the margin of the record of the judgment by one of the attorneys of record who claimed to have acted pursuant to an agreement to compromise

the controversy. The plaintiff thereupon filed a motion in the Circuit Court to vacate the entry of satisfaction on the ground that the entry was made by the attorney without authority from the plaintiff and in fraud of his rights and after the attorney had been notified that the plaintiff would not ratify the compromise. The motion was supported and opposed by affidavits and on full hearing the motion was overruled. A bill of exceptions setting forth all the papers used on the hearing of the motions and containing all the exceptions was signed. Thereupon the plaintiff brought the case to this court on a writ of error.

This court, in disposing of the case, at page 308, said:

"It is contended for the plaintiff in error that the evidence was insufficient to warrant the finding that there was any contract between the first administrator and Mr. Laurie and Mr. Crews, authorizing a compromise; that the first administrator had no authority to make such a contract, or to make a compromise, without the sanction of the Probate Court; that the plaintiff was not bound by the contract made by the first administrator; and that Laurie had no authority to compromise without the cooperation of Crews.

"As to the finding of fact that there was a contract by the first administrator giving to the attorneys an interest in the proceeds of the claim, with authority to compromise it, this court is prohibited by Section 1011 of the Revised Statutes, from reversing a case on a writ of error for any error in fact. In this case there was a dispute as to the fact, and evidence on both sides, and it was a fair exercise of the judgment of the court, on the evidence before it to make the finding of fact it did. Under such circumstances, an erroneous finding of the fact cannot be held to be an error of law. *Hyde* v. *Booracm*, 16 Pet.,

169, 176; *Parks* v. *Turner*, 12 How., 39, 43."

In *St. Louis* v. *Rutz*, 138 U. S., 226, at page 241, it is said:

"The assignments of error made are, that the Circuit Court erred (1) in holding that the title and ownership of the plaintiff extended to the middle of the main channel of the Mississippi River and embraced the premises in controversy; and (2) in refusing to hold that the premises in controversy were an accretion to Arsenal Island, and the property of the City of St. Louis.

"We cannot review the action of the Circuit Court in finding the facts which it did find and refusing to find the facts which it was asked to find and did not find. We can only inquire whether the facts found are sufficient to support the judgment."

In *Insurance Co.* v. *Folsom*, 85 U. S. (18 Wall.), 237, 253, it is said:

"Where the finding is general, as in this case, nothing is open to review but the rulings of the court in the progress of the trial, and as none of the last named exceptions, which are the ones now under consideration, were of that class, they are all overruled. (*Dirst* v. *Morris*, 14 Wall., 490.) Like a special verdict, a special finding furnishes the means of reviewing such questions of law arising in the case as respect the sufficiency of the facts found to support the judgment; but where the finding is general the losing party cannot claim the right to review any questions of law arising in the case, except such as grow out of the rulings of the Circuit Court in the progress of the trial, which do not in any proper sense include the general finding of the Circuit Court nor the conclusions of the Circuit Court embodied in such general finding, as such findings are in the nature of a general verdict and constitute the foundation of the judg-

ment. No review of such a finding can be made here under a writ of error, unless it is accompanied by an authorized special statement of the facts, without imposing upon this court the duty of hearing the whole case, law and fact, as on an appeal in a chancery or in an admiralty suit, which would operate as a repeal of the provisions in the act of Congress, that issues of fact in such cases may be tried and determined by the Circuit Court, and would also violate that clause of the Twenty-Second Section of the Judiciary Act, which prohibits this court from reversing any case 'for any error in fact.'" (1 Stat. at L., 85.)

In *Cooper* v. *Omohundro*, 86 U. S. (19 Wall.), 65, 69, it is said:

"Beyond all doubt the only effect of the exception to the refusal of the court to grant the fifth request, if the exception is admitted to be well taken, will be to require the court here to review the finding of the Circuit Court in a case where the finding is general, and where it is unaccompanied by any authorized statement of the facts, which it is plain this court cannot do, for the reason given in the opinion of the court in the case of *Insurance Company* v. *Folsom* (18 Wall., 237), decided at the present term. Our decision in that case was, that in a case where issues of fact are submitted to the Circuit Court and the finding is general nothing is open to review by the losing party under a writ of error except the rulings of the Circuit Court in the progress of the trial, and that the phrase, 'rulings of the court in the progress of the trial' does not include the general finding of the Circuit Court nor the conclusions of the Circuit Court embodied in such general finding, which certainly disposes of the exceptions to the refusals of the Circuit Court to decide and rule as requested in the first four prayers presented by the defendant,

as it is clear that those exceptions seek to review certain conclusions of the Circuit Court which are necessarily embodied in the general finding of the Circuit Court."

In *Mann* v. *Rock Island Bank*, 78 U. S. (11 Wall.), 650, at page 652, the court say:

"It turns in every point upon simple questions of fact. There is not a doubtful question of law involved in the entire record. That this court should be compelled to undergo the labor of finding the truth in such a mass of testimony, a duty much more appropriate to a master, or to some other tribunal than this, and which in common law cases is peculiarly the province of the jury, is itself a hindrance and obstruction to public justice by the delay which it interposes to the hearing of other cases. We do not feel that this burden should be further increased, and the time of this court, due to other parties and to more important interests, be consumed in writing and delivering opinions which if they attempt to go into examination of the facts to justify the decision of the court, will be equally tedious and useless."

II.

The general finding of the court in favor of the service is fully supported by the proof.

The return of the officer as to the service of the summons and the finding of the court in its judgment as to the facts of that service are at least *prima facie* evidence of the facts so recited.

In Alderson on Judicial Writs and Process, page 530, the author says:

"The 'return' is the primary, and frequently the conclusive evidence of what was done by the officer under the process. It determines whether the officer has performed his duty and of

the effect of his acts upon the person or property of the defendant."

In Murfree on Sheriffs, Sec. 866a, the author says:

"The general rule that an official return of process is conclusive on the parties and their privies in the action in which such process issued, like all general rules, is not without exceptions. * * * Many cases hold that the return is not *per se* such a record as imparts absolute verity, but is so far only *prima facie* evidence of the matter therein recited."

In Ency. of Pleading & Practice, Vol. 18, page 963, it is said:

"An official return is the *best* evidence of the doings of the officer under the mandates of the writ or process, and is sufficient as proof of the facts which the officer is authorized and required to certify. Even when not conclusive evidence, an official return must be regarded as very strong evidence of the facts which the law requires the officer to certify."

And on page 978:

"A return of facts which are not within the personal knowledge of the officer, is not for this reason deprived of its force as *prima facie* evidence of such facts, for even in this case, in the absence of impeaching testimony, the return is sufficient evidence of the facts certified."

In *Wall* v. *Chesapeake & O. Ry. Co.*, 95 Fed., 398, 404, the court say:

"Upon examination of a great many American cases, we believe the general rule in this country, with some dissenting cases like those in Illinois, to be this: That the sheriff's return stands in the first instance as the affidavit of the sheriff, but is subject to be disputed by affidavits on the part of the defendant

showing to the satisfaction of the court, upon motion to quash, that the return is not true in point of fact, or, as in the case at bar, is sufficient in law. *Carr* v. *Bank,* 16 Wis., 50; *Bond* v. *Wilson,* 8 Kan., 228; *Crosby* v. *Farmer,* 39 Minn., 305, 40 N. W., 71; *Walker* v. *Lutz,* 14 Neb., 274, 15 N. W., 352; *Wendell* v. *Mugridge,* 19 N. H., 109; *Stout* v. *Railroad Co.,* 3 McCrary, 1, 8 Fed., 794; *Van Rensselaer* v. *Chadwick,* 7 How. Prac., 297; *Wallis* v. *Lott,* 15 How. Prac., 567; *Watson* v. *Watson,* 6 Conn., 334; *Rowe* v. *Water Co.,* 10 Cal., 442."

In *St. Clair* v. *Cox,* 106 U. S., 350, at page 359, opinion by Mr. Justice Field, it is said, relative to a state suit:

"We are of opinion that when service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court—that the corporation was engaged in business in the state. The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business."

Under the Missouri practice the return of the officer is conclusive as to the facts recited. And he is liable upon his official bond for false return. *Newcomb* v. *New York Central & H. R. R. Co.,* 182 Mo., 687; *Phillips* v. *Evans,* 64 Mo., 17; *Regent Realty Co.* v. *Armour Packing Co.,* 112 Mo. App., 271.

In that state the sheriff is under adequate bond for the

faithful performance of his duties. Revised Statutes of Missouri, 1899, Vol. 2, Sec. 10036.

The sanctity of his oath and the financial obligation imposed by a breach of trust warrant the rule that the sheriff's solemn recital in his official capacity of the manner of the discharge of his official duties make that recital of high, probative force.

This recital is fully supported by the express findings of the court, made after full hearing and recited in the judgment upon which this writ of error is prosecuted. (Transcript p. 11.)

We submit it to be axiomatic that if the return of the sheriff shows good service (and in this case it cannot be argued that the return does not show good service) and that such a return makes *prima facie* proof of the facts recited, this court cannot overturn the finding of the lower court conformable to that return upon two *ex parte* affidavits submitted by the Insurance Company at the hearing, no matter what the recitals of those affidavits may be. And the recitals of those affidavits make it quite clear that their scope is not limited to the personal knowledge of the affiants.

III.

Upon a fair construction of all the proof submitted, the sheriff's return was good in law and the Missouri Court had jurisdiction of the person of defendant.

The proof shows that the defendant Company had been exploiting its business in the State of Missouri for more than ten years prior to the service of this summons. The plaintiff's petition charges that the policy sued on was delivered in Missouri (Record p. 5). The Company had many members, or policy

holders, during all that period, who were citizens and residents of that state. It was continually taking membership fees and premiums out of that state and from the citizens and residents of that state, and it delivered to those citizens and residents many, many contracts which contemplated the adjustment and payment of the losses under those insurance contracts in the State of Missouri. The form of contract attached to the company's *ex parte* affidavit (Transcript p. 30), does not even stipulate that the losses shall be paid in the State of Pennsylvania.

It is well settled that under such a contract payment of the liability is to be made at the domicile of the creditor. *Pennsylvania F. M. Ins. Co.* v. *Meyer,* 197 U. S., 405; *Sanderson* v. *Bowes,* 14 East, 507; *Hale* v. *Patton,* 60 N. Y., 233; (19 Am. Rep., 168); *Dockham* v. *Smith,* 113 Mass., 320 (18 Am. Rep., 495).

The insurance contract expressly stipulated that the representative of the company should be permitted to examine the person or body of the insured in respect to any alleged injury or cause of death when and as often as may be desired. It is scarcely to be supposed that the parties to those contracts contemplated that the corpses should be shipped to Philadelphia for that purpose. Many losses during more than ten years, according to the proof, have been adjusted or settled by this company under the terms of such contracts with its members and beneficiaries in the State of Missouri. Under the ruling of this court these facts alone constitute the prosecution of business by an insurance company in the state of the domicile of the insured for the purpose and to the extent of qualifying the agent or representative of such a company while in that state prosecuting its business to receive service of summons on behalf of the company.

What constitutes doing business in a state? An ordinary individual would expect to find different evidences of the fact that an accident insurance corporation was engaged in business in a state from those manifested by a saw mill company or a glass manufacturing enterprise. An accident insurance corporation need have little, or any, tangible property in a state distant from its home office, and yet prosecute a considerable portion of its activities looking to gain in foreign states. Necessarily its obligations in the nature of insurance contracts and policies, would be lodged in the states where the insured reside. This record tends to show that the policy sued on was delivered in Missouri. This situation may be said to have been contemplated by the parties at the time and subsequently to the making of the contract. Part of such a company's business is to pay losses on its contracts as they occur. The parties necessarily from the initiation of the contract have this scope of that business in mind. The payment of the losses is a very essential and material part of the business of such a company. As we have already seen under the well-settled rule of the authorities, and under the language of the policies issued by the plaintiff in error, the parties to those contracts contemplate that payment of losses shall be made at the place of the residence of the insured. A material part of the business of such a company is to settle, and compromise claims against it under its policies, and to discharge its obligations. The parties contemplate that such compromises shall occur at the domicile of the insured. A part of its business is to get evidence of the validity of the claims of the assured against it. This, of course, must occur at the situs of the insured or deceased. This company, the record shows, had an agent in Missouri during two days within two weeks after this accident to col-

lect evidence as to the validity of this identical claim. A part of this company's business, as disclosed by the terms of the policy, is to examine the body of the deceased—to make inquiries as to the cause of the death. Such activities necessarily occur in the place where the insurance contracts are held and at the place of residence of the insured. This company had an agent in Missouri, some six weeks after the insured death to do that business for his principal under the terms of the identical policy sued on. The evidence here shows that for more than ten years this company had been insuring citizens and residents of the State of Missouri. Neither the entire number so insured, the entire number of policies compromised and settled, nor the number of bodies examined during that period, is disclosed by the record; but facts are shown from which the presumption arises that a great many claims of this sort had been discharged, compromised and paid, and that continuously during this period the company had received and accepted its premiums and dues on account of its policies held in Missouri by citizens and residents of that state. In making such payments and discharging its obligations, investigating evidences of the validty of claims, making inquiries as to the cause of death, and the examination of bodies of the dead, through whatever character of agency employed by the company, whether claim adjuster, doctor or lawyer, the company, so far as effectuating its business is involved, may be said to have been in that state *pro hacc vice*.

But the undisputed proof in this record is that Mr. Mason, at the very time this service was had upon him, was in this state as the agent and representative of the insurance company with full and express power and authority to adjust, compromise and settle the very claim for the enforcement of which this

suit was brought. He had the additional authority for and on behalf of the company to take up and examine the body of the deceased—a dear right and authority of the company which it had expressly reserved in its policy. He was, while in Fayette, in momentary touch with the Home Office of the company through telegraphic and telephonic connections. The whole official force of the company was speaking through him in Fayette in the effort to beat down and compromise this just liability. These proofs, fortified as they are by the sheriff's return, sustain and warrant the finding of the court that the service of the writ on Mr. Mason for and on behalf of the company was good service.

In *Pennsylvania Lumbermen's Mutual Fire Ins. Co.* v. *Meyer,* 197 U. S., 407, it was ruled that service upon a director of the insurance company, who resided in New York, was good service upon the company, although the company was a Pennsylvania corporation, and "the only act done by them (the directors) for it is to attend from time to time the meetings of the board of directors, which were held in the City of Philadelphia, and there to give such advice and take such action in connection with its business as may seem to them proper. They perform no duties and do no acts for the company in the State of New York." The company had issued a policy of insurance on a lumber mill in the State of New York, all of which had been done by correspondence, and it had no agent or place of business or property in the State of New York. The court propounds two questions. 1. Was the company doing business in New York State? 2. Did the cause of action arise within that state? It answers both in the affirmative. In the opinion of the court, by Mr. Justice Peckham, it is said:

"As the policy insures against loss, it of course contemplates that such loss may occur; and it also contemplates that the company shall send to the place where the loss occurred, that is, to New York, its agent, for the purpose stated. When, under the terms of the contract, the company sends its agent into the state where the property was insured, and where the loss occurred, for the purpose of adjustment, it would seem plain that it was then doing the business contemplated by its contract, within the state. A fire insurance company which issues its policies upon real estate and personal property situated in another state is as much engaged in its business when its agents are there under its authority, adjusting the losses covered by its policies, as it is when engaged in making contracts to take such risks. * * * We think it would be somewhat difficult for the defendant to describe what it was doing in New York, if it was not doing business therein, when sending its agents into that state to perform the various acts of adjustment provided for by its contracts, and made necessary to carry them out. We have no difficulty in concluding that that the defendant was doing business in the State of New York all the time of the existence of these policies. * * * It would be most unwise to hold, upon the facts herein stated, that a person who suffered loss under a policy of insurance could only obtain redress, when refused by the company, in the courts of the state where the company was incorporated. It is not unreasonable for the state, under such facts, to endeavor to secure to its citizens a remedy in the domestic forum upon this very important class of contracts."

In *Houston* v. *Filer & S. Co.*, 85 Fed., 757. In the opinion by Grosscup, D. J., it is said:

"The conference proved unavailing, whereupon, at its con-

clusion, in pursuance of a prearrangement made by the plaintiffs, a deputy sheriff served upon the general manager of the defendant a summons in the action now pending. The purpose of the motion under consideration is to vacate service. The action was removed by the defendant upon a special appearance for the purpose of vacating service. A corporation is not necessarily found in the county or district merely because one of its general officers may be there, though the officer be its general manager. But when he is in the county or district, under charge of the corporation, to do something with respect to the business upon which the suit is brought, and when his being there is not the result of fraudulent enticement, I can see no reason why service on him is not service upon the corporation, or why the corporation is not, in his person, and during the time covered by his presence for such a purpose, itself present in the county or district. Had the matter been the manager's individually, and the suit been against him individually, there can be no doubt the service, under the circumstances stated, ought to be maintained; but the general manager was, for the time being, in the matter in which he was sent, the corporation, and brought to this county and district the presence of the corporation as effectually as that could be done. The corporation sending him to transact the corporate business was, within the limits of that business, itself present."

In *Conn. M. L. I. Co.* v. *Spratley*, 172 U. S., 602, it is held that a foreign insurance company which assumes to withdraw from a state in which it has been issuing policies, and thereafter refuses to take any new risks or issue any new policies, but continues to collect premiums on outstanding policies, and pay losses thereunder is still doing business within that state, and

that its nonresident agent who comes into the state to investigate a claim with power to compromise it within stated terms, leaving him certain discretion as to the amount, sufficiently represents the company for service of process in an action on the claim he is investigating.

In *Chattanooga Natl. B. & L. Assn.* v. *Denson,* 189 U. S., 408, it is held that the granting of a loan by a Tennessee corporation to a citizen of Alabama upon the latter's signed application, solicited by a traveling agent of the Tennessee company, and the taking as security of a note and mortgage executed within Alabama by the borrower constitutes, regardless of the forms and terms of such instruments, the doing of business in the State of Alabama.

In *Funk, Admr.* v. *Anglo-American Ins. Co.,* 27 Fed., 335, it is held by Treat, J., in our circuit, that an insurance company, although it had not complied with the laws of this state relative to the doing of business in the state by foreign insurance companies, was brought within the jurisdiction of the court by the service of a summons upon a person as the agent of the defendant, which person had delivered the contract of insurance in this district and collected premiums under it. The learned judge said:

"As heretofore held by this court the contract of insurance was made in this district by said Noyes as the agent of the defendant, consequently, said agent under the rules of law still remains such agent for the purpose of service, unless possibly due notice had been given to the plaintiff that he had ceased to be said agent. Where contracts by a foreign insurance company are made in a state without regard to its legal requirements, the company should not be permitted to escape from its liabilities

through its non-compliance with the statutory laws of said state. It appears that this policy was formerly delivered and premiums collected thereon by the defendant's agent, W. A. Noyes, within this district; that service in this case was had on said agent Noyes; therefore neither a motion to quash, nor a plea in abatement as to service could prevail."

The language of the opinion in *St. Clair* v. *Cox,* 106 U. S., 350, fully sustains our contention. Among other things it is said in the opinion by Mr. Justice Field:

"According to the view thus expressed by the Supreme Court of Michigan service upon an agent of a foreign corporation will not be deemed sufficient unless he represents the corporation in the state. This representation implies that the corporation does business, *or has business* in the state, for the transaction of which it *sends* or appoints an agent there. * * * The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be *prima facie* evidence that the agent represented the company in the business."

There can be no doubt under this proof that the notice of the institution of this suit given to the defendant through its agent, Mr. Mason, was effectual for the purpose intended. He immediately, without further instructions, went in the opposite direction from his home office to Kansas City, one of the metropolitan cities of the state, and consulted attorneys and laid all the papers in the case before them, and these attorneys on the same day prepared and verified a petition for the removal of the cause, and evidently on that day sent it to the clerk of the court at Fayette, Missouri, for it was there filed in due course on the

succeeding day. It is quite evident from the conduct of this defendant that due notice is not what is lacking or what it has been deprived of, but that its great want is to escape due notice. Courts do not sympathize with such aspirations. Its counsel gave notice to take depositions in support of its motion to quash and stipulated in that notice that statutory formalities as to time and method of taking the depositions should be waived.

It is held in *Bates* v. *Scott,* 26 Mo. App., 430, that the taking and filing of depositions in a case is a general appearance.

IV.

It is complained in the amended motion to quash, although the assignment of errors does not specifically reiterate the contention, that Frank G. Mason, the company's agent, was fraudulently induced to come into Missouri for the purpose of serving summons upon him.

The Circuit Court on full and ample proof determined this issue against the plaintiff in error. This court will not undertake to review or re-weigh the evidence on which that finding is made, because no ground to justify that inquiry is recited in the assignment of errors.

This contention of the plaintiff in error is absurd. It sent this same man (Mr. Mason) into the state and he stayed here during January 14 and 15, 1907, although the only request made by the defendant in error of the company prior to that time was that she might have blank forms on which to prove up her claim in accordance with the practice of the company. On January 28 it sought to have its representative invited into the state to harrass a widow with the suggestion of re-opening the grave and taking out the body of her late husband (Transcript p. 63). On

February 6 under the threat of a violated policy, it requested that its agent might come to Fayette to examine the body of the deceased husband. It must appear to any person who reads between the lines that the effort of the company in writing the letters refered to and in sending Mr. Mason to Fayette on January 14 and 15, with his derogatory statements as to the financial condition of the company and its business methods, was to effect a compromise and settlement of the claim for less than the amount justly due. In the light of the suggestions and demands made by the company it certainly was not fraudulent for Mrs. Davis to concede to its request to be allowed to send its agent there for the purpose of examining the body of the deceased. And it certainly was not fraudulent in her to desire and request that such representative should be duly accredited and that he might have indisputable authority to do what he and the company both wanted to do, and what he surely would try to do, namely, to settle that claim.

It is absurd to suppose that this woman would contemplate or, think it possible to deceive the wily insurance company who had its own lawyers, who is presumed to know the laws of the states where it is carrying on its business, and whose chief capital in trade, one would suppose, was its ability to evade making good its obligations.

The finding and order of the court below overruling the amended motion of defendant below to quash the return of the sheriff being supported by the evidence, and no attack being made upon the legality and justness of the final judgment below, except that recited in said motion, it is respectfully submitted that the writ of error should be dismissed.

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